United States Court of Appeals

for the Second Circuit

APPENDIX

75-1345

B
P/S

ARGUED BY:
ROBERT RIVERS

APPEAL NO. 74 CR 765

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT: NEW YORK

UNITED STATES OF AMERICA,

-against-

DOMINICK SEMINARA,

Defendant-Appellant,

APPENDIX

Submitted by:

TO: HON. DAVID G. TRAGER
United States Attorney
225 Cadman Plaza
Brooklyn, New York

ROBERT RIVERS, ESQ.
Attorney for Appellant
Office & P.O. Address
287 Post Avenue
Westbury, New York 11590
(516) 333-3555

UNITED STATES COURT OF APPEALS
FILED
NOV 14 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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JWR:HJF:ald
F.#741387

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★
DEC 6 1974
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

STEPHEN LENT and
DOMINICK SEMINARA,

Defendants.

- - - - - - - - - - - - - - - - X

74CR 765

Cr. No. _____
(T. 18 U.S.C. §1341 and §2)

THE GRAND JURY CHARGES:

COUNTS ONE THROUGH FIFTY

1. During all times material herein, Foto Factory Ltd. was a corporation duly organized and existing under the laws of the State of Delaware and was engaged in the business of processing or developing photographic film at 240 Maple Avenue, Rockville Centre, New York.

2. During all times material herein, the defendant Stephen Lent, did serve as President and was a director and stockholder of Foto Factory Ltd.

3. During all times material herein, the defendant Dominick Seminara, did serve as Treasurer and was a director and stockholder of Foto Factory Ltd.

4. On or about and between September 15, 1973, and October 30, 1973, within the Eastern District of New York, the defendants Dominick Seminara and Stephen Lent did unlawfully, wilfully and knowingly devise and intend to devise a scheme and artifice to defraud approximately 12,000 BankAmericard and MasterCharge credit card holders throughout the United States, as well as the Chase Manhattan Bank N.A., the National Bank of North America and the First National City Bank, and to obtain approximately $120,000 from said banks by means

of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be and were false and fraudulent when made.

5. It was part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently cause to be prepared and sent through the mail, envelopes for film processing (designated "Prepaid Processing Mailer") to persons whom they knew to be BankAmericard and MasterCharge credit card holders without any prior knowledge or consent of the credit card holders.

6. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently cause to be prepared and included with the "Prepaid Processing Mailer[s]", a written statement setting forth the following representation:

MONEY BACK GUARANTEE

Enclosed is your assortment of prepaid Foto Factory mailers. One for 12 exposure color film, 2 for 20 exposure color film and one for 20 exposure slide film or Super 8 movie film.

When you are ready to develop your film, simply fill out name and address and enclose film - SEND NO MONEY - these are prepaid mailers.

We are certain you will enjoy dealing direct with the Foto Factory. Be sure not to lose or destroy these mailers. They are worth $22.10.

7. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently omit and conceal from the written statement, quoted in paragraph 6, the fact that each account of the credit card holders was being simultaneously charged $9.95 with the mailing of each of the "Prepaid Processing Mailer[s]".

8. It was a further part of the schema and artifice to defraud that the defendants Dominick Seminara and Stephen Lent

did knowingly and fraudulently cause credit card sales slips, each in the sum of $9.95, to be prepared, deposited and credited to the bank accounts of Foto Factory Ltd. maintained at Chase Manhattan Bank N.A., National Bank of North America and First National City Bank.

9. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently cause the withdrawal of all but a nominal sum of monies from the aforesaid bank accounts of Foto Factory Ltd., on a daily basis.

10. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently give, and cause to be given, a false and misleading explanation to credit card holders who inquired about the reason their accounts had been charged $9.95, in that the credit card holders were told that their accounts had been mistakenly charged as the result of a "computer error".

11. On or about the dates hereinafter set forth, within the Eastern District of New York, the defendants Dominick Seminara and Stephen Lent, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did unlawfully, wilfully and knowingly place and cause to be placed in post offices and authorized depositories for mail matter, the aforesaid "Prepaid Processing Mailer[s]" and accompanying written statements, to be sent and delivered by the United States Postal Service, in violation of Title 18, United States Code, Sections 1341 and 2, as hereinafter set forth in Counts One through Fifty.

COUNT	DATE	ADDRESSEE
(1)	September 21, 1973	David Sandler 24 Academy Circle Oakland, N.J. 07436

COUNT	DATE	ADDRESSEE
2	September 28, 1973	Lawrence H. Tomlinson 20801 Olympian Way Olympia Fields, Ill. 60861
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39	October 19, 1973	R. J. Stewart P.O. Box 185 Long Beach Br. Beach Haven, N.J. 08008
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49	October 25, 1973	Bruce J. Miller 13 Doe Lane Malverne, Pa. 19355
50	October 25, 1973	John Reeves 3264 Clifton Ct. Palo Alto, Calif. 94303

A TRUE BILL.

James R. Wechsler
FOREMAN.

David G. Trager
UNITED STATES ATTORNEY

Form DJ-195
(Ed. 2-7-66)

No. _____

UNITED STATES DISTRICT COURT

Eastern *District of* New York

_____ *Division*

THE UNITED STATES OF AMERICA

vs.

STEPHEN LENT and

DOMINICK SEMINARA

INDICTMENT

T. 18, U.S.C. §1341

and §2

A true bill,

_____
Foreman.

Filed in open court this _____ *day*

of _____, *A. D. 19*___

_____
Clerk.

*Bail, $*_____

Harold J. Friedman
Assistant U.S. Attorney
596-3012

GPO 902-482

The Court having been satisfied that a majority of the Grand Jury of October, 1974 have concurred in this True Bill, orders the Indictment filed.

12/6/74

Bruce A. Nims
DEPUTY CLERK

DEC 16 1974

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

NOTICE OF APPEARANCE

DOCKET NUMBER: 74CR765

UNITED STATES OF AMERICA
Plaintiff

-against-

STEPHEN LENT
PLEASE PRINT NAME

Defendant

DATED: 12/13/74

DATE OF ARREST :

PLEASE TAKE NOTICE, that I have been retained by Stephen Lent
, Defendant, above named.

I was admitted to practice in this District on 15-20 yrs.

SIGNATURE Harold Felderstein of Counsel
HF SOROH SPEC COUNSEL TO ALVIN RPINCUS
PLEASE PRINT YOUR NAME

OFFICE ADDRESS 2950 HEMPSTEAD TPKE

OFFICE TELEPHONE 516-731-4141

(If Defendant's Attorney is a Law Firm, indicate member thereof who is to try this case and whose professional engagements are to be considered in any application for adjournment.)

TO: U. S. ATTORNEY
Original to be filed in CLERK'S OFFICE

LEWIS ORGEL
CLERK

by: Bruce H Weiss
Deputy Clerk

DATE: 12/13/74

3

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

NOTICE OF APPEARANCE

UNITED STATES OF AMERICA
Plaintiff

-against-

DOMINICK SEMINARA
PLEASE PRINT NAME

Defendant

DOCKET NUMBER: 74-CR 765

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
DEC 16 1974
TIME A.M.
P.M.

DATED: Dec 13th 1974

DATE OF ARREST : Dec 13th 1974

PLEASE TAKE NOTICE, that I have been retained by DOMINICK SEMINARA, Defendant, above named.
I was admitted to practice in this District on 1961.

SIGNATURE Robert Rivers

PLEASE PRINT YOUR NAME
ROBERT RIVERS

OFFICE ADDRESS 287 Post Ave Westbury

OFFICE TELEPHONE 333-3555

(If Defendant's Attorney is a Law Firm, indicate member thereof who is to try this case and whose professional engagements are to be considered in any application for adjournment.)

TO: U. S. ATTORNEY
Original to be filed in CLERK'S OFFICE

LEWIS ORGEL
CLERK

By: _____ DATE: _____
Deputy Clerk

9

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X 74CR765

UNITED STATES OF AMERICA

MOTION

-against-

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
JAN 10 1975

STEPHEN LENT AND DOMINICK SEMINARA, Indict. No.

Defendants,

----------X

SIR:

PLEASE TAKE NOTICE, that upon the indictment herein and upon the Indictment No. 38889 pending in Nassau County, and upon all the proceedings had herein, an application will be made by the defendants at a stated term of the United States District Court of the EASTERN DISTRICT OF NEW YORK for the hearing of criminal motions, to be held at the United States Courthouse, Federal Building, Brooklyn, New York on the 17th day of January, 1975 at the opening of court or that day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12 (b) (1) of federal rules of criminal procedures dismissing the indictment and each and every court thereof, upon the following grounds:

1. Said indictment is uncertain, illogical, vague, indefinite and does not with sufficient particularity and accuracy set out any offense known to the law.

2. The scheme or artifice to defraud alleged therein to have been devised by the defendants is not set forth with sufficient accuracy and particularity as to inform the defendants of the fraud charged against them.

10

3. Said indictment does not allege a false pretense concerning a past or existing fact and in its description of the artifice or scheme to defraud, allege the attempted consummation of said scheme by means of an attempted promise of future performance.

4. No false or unlawful pretense, fraud, artifice or scheme is sufficiently and accurately set out in said indictment, and until it is so pleaded, an allegation that the post office establishment of the United States was used in furtherance of it alleged no offense known to the law. Further, defendants had no intention of not performing their obligation stipulated in the "said prepaid mailing" and as a matter of fact continued to perform their obligations to their customers until the necessary funds were cut off by the Banks.

5. It is nowhere alleged in said indictment that the persons therein indicted as intended to be defrauded believed the false pretense alleged therein to have been made or that said persons or any of them believing said alleged false pretense were induced thereby to and did part with their money or other valuable things.

6. That the seizure of the property of the defendants alleged to have been possessed and used by them in violation of the law, was improperly made and in violation of the constitutional rights of the defendants, and the evidence thereof should not have been submitted to the Grand Jury.

7. That the defendants together with others by an Indictment No. 38889 are charged with different offenses in the County of Nassau, a copy of the said indictment is annexed hereto as defendants exhibit, and the facts in the said indictment formed the basis of the within indictment in that the time, place of occurrence and transaction are the same. The offenses charged are identical both in fact and law and not distinct and separate crime. The conviction or acquittal under the indictment pending in Nassau County is a bar to prosecution under the instant indictment. It must further be noted that the said indictment pending in Nassau County charges the defendants with the crime of Grand Larceny in the second degree, forgery in the second degree, and criminal possession of forged instrument. The basic element common to all the said crimes is an "intention to defraud". It is apparent that the defendants are facing the most serious charges for their conduct and therefore to proceed against them in federal court on charges of mail fraud which has an "intention to defraud" as one of its basic elements is tantamount to placing defendants in double jeopardy for the same conduct.

8. That the mailing of envelopes for film processing (designated "prepaid processing mailer") was not sufficiently closely related to the alleged scheme of the defendants to defraud as to bring their conduct within the meaning of the statute.

Dated - Westbury, New York
January 9, 1975

Respectfully submitted:

ROBERT RIVERS
Attorney for Defendant
Office & P.O. Address
287 Post Avenue
Westbury, New York 11590

TO: U.S. Attorney
225 Cadman Plaza East
Brooklyn, New York

Indictment
U.S. District Court

F.#741387

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

STEPHEN LENT and
DOMINICK SEMINARA,

Defendants.

Cr. No. _____
(T. 18 U.S.C. §1341 and §2)

- - - - - - - - - - - - - - - - - - X

THE GRAND JURY CHARGES:

COUNTS ONE THROUGH FIFTY

1. During all times material herein, Foto Factory Ltd. was a corporation duly organized and existing under the laws of the State of Delaware and was engaged in the business of processing or developing photographic film at 240 Maple Avenue, Rockville Centre, New York.

2. During all times material herein, the defendant Stephen Lent, did serve as President and was a director and stockholder of Foto Factory Ltd.

3. During all times material herein, the defendant Dominick Seminara, did serve as Treasurer and was a director and stockholder of Foto Factory Ltd.

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of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be and were false and fraudulent when made.

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7. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently omit and conceal from the written statement, quoted in paragraph 6, the fact that each account of the credit card holders was being simultaneously charged $9.95 with the mailing of each of the "Prepaid Processing Mailer[s]".

8. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent

did knowingly and fraudulently cause credit card sales slips, each in the sum of $9.95, to be prepared, deposited and credited to the bank accounts of Foto Factory Ltd. maintained at Chase Manhattan Bank N.A., National Bank of North America and First National City Bank.

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11. On or about the dates hereinafter set forth, within the Eastern District of New York, the defendants Dominick Seminara and Stephen Lent, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did unlawfully, wilfully and knowingly place and cause to be placed in post offices and authorized depositories for mail matter, the aforesaid "Prepaid Processing Mailer[s]" and accompanying written statements, to be sent and delivered by the United States Postal Service, in violation of Title 18, United States Code, Sections 1341 and 2, as hereinafter set forth in Counts One through Fifty.

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A TRUE BILL.

_____
FOREMAN.

_____
UNITED STATES ATTORNEY

No. _____

UNITED STATES DISTRICT COURT

Eastern District of New York

_____ Division

THE UNITED STATES OF AMERICA

vs.

STEPHEN LENT ET AL.

DOMINICK SEMINARA,

INDICTMENT

T. 18, U.S.C. §1341

and §2

A true bill,

_____
Foreman.

Filed in open court this _____ day

of _____, A.D. 19__

_____
Clerk.

Bail, $_____

_____

Harold J. Friedman
Assistant U.S. Attorney
516-3012

Indictment Nassau
County

COUNTY COURT : NASSAU COUNTY

THE PEOPLE OF THE STATE OF NEW YORK	:
- against -	:
DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD. Defendants	:

THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, accuse the defendants of the crime of GRAND LARCENY IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between on or about the 1st day of September, 1973, to the 17th day of December, 1973, stole certain property from the First National City Bank, having an aggregate value of over $1,500.00, to wit, lawful currency of the United States of America, the value of over $1,500.00, with the intent to deprive the owner thereof, and of the use and benefit thereof, and to appropriate the same to the use of the defendants.

SECOND COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of FORGERY IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, with intent to defraud, deceive and injure another, falsely made, completed and altered a written instrument, of which the following is a copy, the same being and purporting to be and calculated to become and to represent, if completed, a commercial instrument and other instrument, to wit, a credit card charge slip, which does and may evidence, create, transfer, terminate and otherwise effect a legal right, obligation and status:

5218-0068-211-630

5478046

Alfred J. Angerthal
181 Buschen Ave.
Valley Stream, N.Y.

FOTO FACTORY
LTD
ROCKVILLE CTR
365 020 1119 MT

9 26 73

QTY	CLASS	DESCRIPTION	UNIT COST	AMOUNT
1		Reductory photo Union Offic		9 95
		FIRST NATIONAL CITY BANK		
			SUB TOTAL	
			TAX	
			TOTAL	9 95

master charge

MERCHANT COPY SALES SLIP

GW#66
ID

THIRD COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of CRIMINAL POSSESSION OF A FORGED INSTRUMENT IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, knowing the same to be forged and with intent to defraud, deceive and injure another, uttered and possessed the forged instrument set forth in the second count of this indictment.

FOURTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of FORGERY IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, with intent to defraud, deceive and injure another, falsely made, completed and altered a written instrument, of which the following is a copy, the same being and purporting to be and calculated to become and to represent, if completed, a commercial instrument and other instrument, to wit, a credit card charge slip, which does and may evidence, create, transfer, terminate and otherwise effect a legal right, obligation and status:

5218 0065 908 725

5479020

Frank Benson
238 Cedarhurst
Cedarhurst, N.Y. 11516

FOTO FACTORY
LTD
ROCKVILLE CTR 9 26 73
365 029 1119 NY

QTY	CLASS	DESCRIPTION	UNIT COST	AMOUNT
		~~Introductory Photo Mailer Offer~~		~~9 95~~

TAKE | SEND | DEPT.
CLERK NO. | INITIALS
AUTHORIZATION NO.
NO. | DAY

SUB TOTAL
TAX
TOTAL 9 95

MERCHANT COPY SALES SLIP

GN #6D
FD

FIFTH COUNT

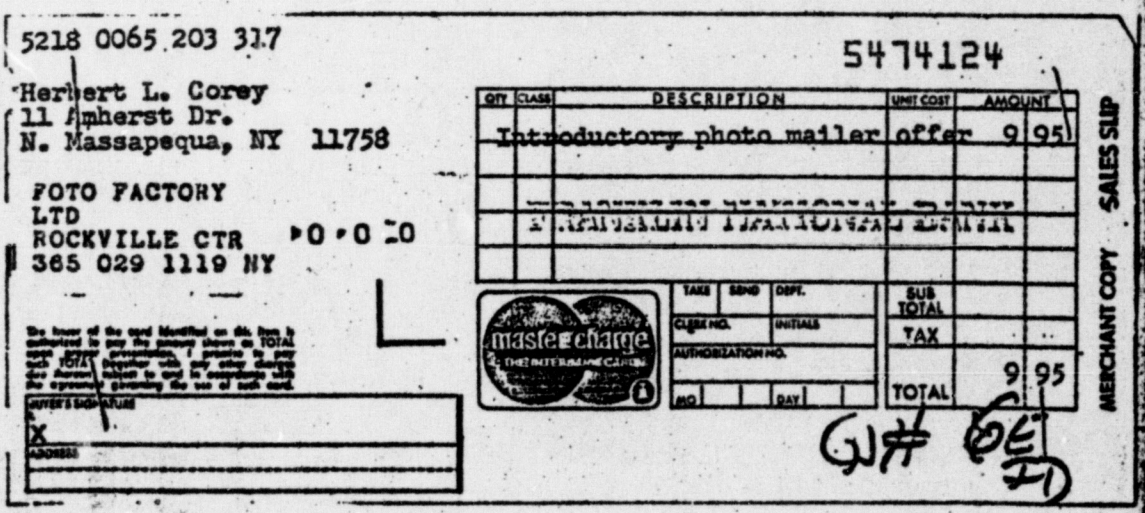
AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of CRIMINAL POSSESSION OF A FORGED INSTRUMENT IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, knowing the same to be forged and with intent to defraud, deceive and injure another, uttered and possessed the forged instrument set forth in the fourth count of this indictment.

SIXTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of FORGERY IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, with intent to defraud, deceive and injure another, falsely made, completed and altered a written instrument, of which the following is a copy, the same being and purporting to be and calculated to become and to represent, if completed, a commercial instrument and other instrument, to wit, a credit card charge slip, which does and may evidence, create, transfer, terminate and otherwise affect a legal right, obligation and status:



5218 0065 203 317

5474124

Herbert L. Corey
11 Amherst Dr.
N. Massapequa, NY 11758

FOTO FACTORY
LTD
ROCKVILLE CTR
365 029 1119 NY

QTY	CLASS	DESCRIPTION	UNIT COST	AMOUNT
		Introductory photo mailer offer		9 95

TAKE | SEND | DEPT.
CLERK NO. | INITIALS
AUTHORIZATION NO.
MO | DAY

SUB TOTAL
TAX
TOTAL 9 95

master charge THE INTERBANK CARD

SALES SLIP
MERCHANT COPY

GW# 6E F1

SEVENTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of CRIMINAL POSSESSION OF A FORGED INSTRUMENT IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, knowing the same to be forged and with intent to defraud, deceive and injure another, uttered and possessed the forged instrument set forth in the sixth count of this indictment.

EIGHTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of FORGERY IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, with intent to defraud, deceive and injure another, falsely made, completed and altered a written instrument, of which the following is a copy, the same being and purporting to be and calculated to become and to represent, if completed, a commercial instrument and other instrument, to wit, a credit card charge slip, which does and may evidence, create, transfer, terminate and otherwise effect a legal right, obligation and status:

5475815

5218 0063 201 883

Edward F. Junge
105 Bethpage Rd.
Hicksville, NY 11801

FOTO FACTORY
LTD
ROCKVILLE CTR
365 029 1119 NY

QTY	CLASS	DESCRIPTION	UNIT COST	AMOUNT
		Introductory photo mailer offer		9 95
			SUB TOTAL	
			TAX	
			TOTAL	9 95

master charge

TAKE | SEND | DEPT.
CLERK NO. | INITIALS
AUTHORIZATION NO.
MO | DAY

ENTER SIGNATURE
X

SALES SLIP
MERCHANT COPY

QN#6C

NINTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of CRIMINAL POSSESSION OF A FORGED INSTRUMENT IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, knowing the same to be forged and with intent to defraud, deceive and injure another, uttered and possessed the forged instrument set forth in the eighth count of this indictment.

TENTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of FORGERY IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, with intent to defraud, deceive and injure another, falsely made, completed and altered a written instrument, of which the following is a copy, the same being and purporting to be and calculated to become and to represent, if completed, a commercial instrument and other instrument, to wit, a credit card charge slip, which does and may evidence, create, transfer, terminate and otherwise effect a legal right, obligation and status:

5218 0065 311 037

5474287

Frank C. Ferri
84 Marlboro Rd.
Valley Stream N.Y.

FOTO FACTORY
LTD
ROCKVILLE CTR
365 029 1119 NY

QTY	CLASS	DESCRIPTION	UNIT COST	AMOUNT
1		Introductory Photo Mailler Offer		9.95
		[illegible]		
			SUB TOTAL	
			TAX	
			TOTAL	9.95

master charge

TAKE | SEND | DEPT. | CLERK NO. | INITIALS | AUTHORIZATION NO. | MO | DAY

BUYER'S SIGNATURE

ADDRESS

MERCHANT COPY SALES SLIP

GN #6A
ID

ELEVENTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of CRIMINAL POSSESSION OF A FORGED INSTRUMENT IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, knowing the same to be forged and with intent to defraud, deceive and injure another, uttered and possessed the forged instrument set forth in the tenth count of this indictment.

TWELFTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of FORGERY IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, with intent to defraud, deceive and injure another, falsely made, completed and altered a written instrument, of which the following is a copy, the same being and purporting to be and calculated to become and to represent, if completed, a commercial instrument and other instrument, to wit, a credit card charge slip, which does and may evidence, create, transfer, terminate and otherwise effect a legal right, obligation and status:

5218 0089 337 810

Stanley E. Shaw
23 Andover Rd.
Port Washington, N.Y.

FOTO FACTORY
LTD
ROCKVILLE CTR ▶9 21 73
365 029 1119 NY

☐ TAKE ☐ SEND

master charge.

FIRST NATIONAL CITY BANK

QTY.	CLASS	DESCRIPTION	UNIT COST	AMOUNT
		Introductory Photo Mailer Offer		9 95
DATE		CLERK'S NUMBER	CLERK INITIAL	SUB TOTAL
				SALES TAX
				FEDERAL TAX
				TOTAL 9 95

The issuer of the card identified on this item is authorized to pay the amount shown as TOTAL upon proper presentation. I promise to pay such TOTAL (together with any other charges due thereon) subject to and in accordance with the agreement governing the use of such card.

8162095

SALES SLIP - SELLER'S COPY

X
BUYER'S SIGNATURE

X
BUYER'S ADDRESS

W76F ID

THIRTEENTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of CRIMINAL POSSESSION OF A FORGED INSTRUMENT IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, knowing the same to be forged and with intent to defraud, deceive and injure another, uttered and possessed the forged instrument set forth in the twelfth count of this indictment.

FOURTEENTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of FORGERY IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, with intent to defraud, deceive and injure another, falsely made, completed and altered a written instrument, of which the following is a copy, the same being and purporting to be and calculated to become and to represent, if completed, a commercial instrument and other instrument, to wit, a credit card charge slip, which does and may evidence, create, transfer, terminate and otherwise effect a legal right, obligation and status:

5473627

5218 0080 307 101

Wm. Goldfarb
330 Blacksmith Rd.
Levittown, NY 11756

FOTO FACTORY
LTD
ROCKVILLE CTR
365 029 1119 NY

QTY	CLASS	DESCRIPTION	UNIT COST	AMOUNT
		Introductory photo mailer offer		9.95

FAIRFIELD NATIONAL BANK

master charge

SUB TOTAL
TAX
TOTAL 9.95

MERCHANT COPY SALES SLIP

X

FIFTEENTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of CRIMINAL POSSESSION OF A FORGED INSTRUMENT IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, knowing the same to be forged and with intent to defraud, deceive and injure another, uttered and possessed the forged instrument set forth in the fourteenth count of this indictment.

SIXTEENTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of FORGERY IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, with intent to defraud, deceive and injure another, falsely made, completed and altered a written instrument, of which the following is a copy, the same being and purporting to be and calculated to become and to represent, if completed, a commercial instrument and other instrument, to wit, a credit card charge slip, which does and may evidence, create, transfer, terminate and otherwise effect a legal right, obligation and status:

5474382

5218 0080 307 101

Wm. Goldfarb
330 Blacksmith Rd.
Levittown, NY 11756

FOTO FACTORY
LTD
ROCKVILLE CTR
365 029 1119 NY

QTY	CLASS	DESCRIPTION	UNIT COST	AMOUNT
		~~Introductory photomailer offer~~		9.95

master charge

TAKE | SPNO | DEPT.
CLERK NO. | INITIALS
AUTHORIZATION NO.
MO | DAY

SUB TOTAL
TAX
TOTAL 9.95

MERCHANT COPY SALES SLIP

GJ# 6B ID

SEVENTEENTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of CRIMINAL POSSESSION OF A FORGED INSTRUMENT IN THE SECOND DEGREE, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973 to the 17th day of December, 1973, knowing the same to be forged and with the intent to defraud, deceive and injure another, uttered and possessed the forged instrument set forth in the sixteenth count of this indictment.

EIGHTEENTH COUNT

AND THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, further accuse the defendants of the crime of FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE, in violation of Section 175.10 of the Penal Law of the State of New York, committed as follows:

The defendants, DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD., and each of them, and each aiding and abetting the other, in the County of Nassau, State of New York, from between, on or about the 1st day of September, 1973, to the 17th day of December, 1973, did falsify the business records of the FOTO FACTORY, LTD., to wit, falsifying the credit card charge slips, by causing to be inserted thereon orders for introductory photomailer offer for $9.95, alleged to have been ordered by various individuals, including, but not limited to Alfred J. Angerthal, Frank Benson, Herbert L. Corey, Edward F. Junge, Frank C. Ferri, Stanley E. Shaw, and William Goldfarb, whereas, the said Alfred J. Angerthal, Frank Benson, Herbert L. Corey, Edward F. Junge, Frank C. Ferri, Stanley E. Shaw and William Goldfarb, did not order merchandise or authorize the charges to their individual Master Charge accounts, with the intent to defraud the First National City Bank, including the intent to commit the crimes alleged in the First, Second, Fourth, Sixth, Eighth, Tenth, Twelfth, Fourteenth, Sixteenth Counts of this indictment to which reference is hereby made.

All of the acts and transactions alleged in each of the several counts of this indictment are connected together and form part of a common scheme and plan.

Dated: December 18, 1973

WILLIAM CAHN
District Attorney

No. 38889

Bond

Field day of 19

Pleads

COUNTY Court

Nassau County

THE PEOPLE

vs.

DOMINICK SEMINARA, STEPHEN LENT, P. MICHAEL LENT, NICHOLAS MASCARA and FOTO FACTORY, LTD. Defendants

WILLIAM CAHN
District Attorney

Indictment for

GRAND LARC. SECOND DEG., FORGERY SECOND DEG. (8cts), CRIM. POSS. FORGED INSTR. SECOND DEG. (8cts), ~~FALSIFYING BUS. RECORDS FIRST DEG.~~

A TRUE BILL

Foreman

Counsel,

Tried the day of 19

Verdict,

Sentenced,

DA-56 .8/70 DA-1187.9/71

32

Dated: .....

AFFIRMATION BY ATTORNEY

STATE OF NEW YORK,
COUNTY OF

The undersigned, an attorney admitted to practice in the courts of New York State, states: that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same are true to deponent's own knowledge except as to the matters therein stated to be alleged on information and belief; and that as to those matters deponent believes them to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: .....

INDIVIDUAL VERIFICATION

STATE OF NEW YORK,
COUNTY OF ss.:

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true.

Sworn to before me, this day of 19 .....

CORPORATION VERIFICATION

STATE OF NEW YORK,
COUNTY OF ss.:

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true.
This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF

, being duly sworn, deposes and says that deponent is over the age of 18 years, is not a party to the action and resides at

That on the day of 19

at No.

deponent served the within

upon

thereof. Deponent knew the person served as aforesaid to be the person mentioned and described in said papers as the therein.

Sworn to before me this

day of 19

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK
COUNTY OF

, being duly sworn, deposes and says that deponent is over the age of 18 years, is not a party to the action and resides at

That on the day of 19

deponent served the within

upon the attorney in the within action at the address designated by said attorney by depositing the same in a postpaid wrapper in an official depository of the United States Post Office in the State of New York.

Sworn to before me this

day of 19

NOTICE OF ENTRY

Sir : PLEASE TAKE NOTICE that the within is a true-certified-copy of a

duly entered in the office of the clerk of

on 19

Dated: 19

Yours, etc.,

ROBERT RIV'S

Attorneys for

Office and Post Office Address
287 POST AVENUE
Westbury, New York 11590

To

Attorney for

NOTICE OF SETTLEMENT

Sir : PLEASE TAKE NOTICE that

of which the within is a true copy will be presented for settlement to Mr. Justice

one of the Justices of the within nam d Curt at
ot. ..e day of 9
at M.

Dated: 19

Yours, etc.,

ROBERT RIVERS

Attorneys for

Office and Post Office Address
287 POST AVENUE
Westbury, New York 11590

To

Attorney for

Index No. 19

ROBERT RIVERS

Attorneys for

Office and Post Office Address
287 POST AVENUE
Westbury, New York 11590
(516) ED 3-3566

To Esq.

Attorney for

Service of a copy of the within

is hereby admitted.

Dated, N. Y., 19

Attorney for

JAN 10 9 02 AM '75
EAST. DIST. N. Y.

4A

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ JAN 10 1975 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74CR765

----------X

UNITED STATES OF AMERICA,

-against-

Indict. No.

STEPHEN LENT and DOMINICK SEMINARA,

Defendants,

----------X

MEMORANDUM OF LAW

----------X

Submitted by:

ROBERT RIVERS
Attorney for Defendant
Office & P.O. Address
287 Post Avenue
Westbury, New York 11590

TO: U.S. Attorney
225 Cadman Plaza East
Brooklyn, New York

STATEMENT OF FACTS

The Federal Grand Jury of Kings County on the 9th day of December 1973 indicted the above-named defendants under Title 18 U.S.C. 1341 and 2. The said indictment, however, stems from the operation and organization of foto factory by the defendants.

The basis of the indictment is that on or about and between September 15, 1973, and October 30, 1973, the defendants devised a scheme to defraud a certain credit cardholder and in furtherance of the scheme defendants fraudulently caused to be prepared and sent through the mail, envelopes for film processing to certain credit cardholders without disclosing that each account of the credit cardholders was being simultaneously charged $9.95 with the mailing of each of the"prepaid processing mailers".

It is the contention of the defendants that their conduct does not constitute the crime charged and further it would be a travesty of justice to expect defendants to face two trials on the same facts.

POINT ONE

THE INDICTMENT FAILS TO STATE AN OFFENSE AGAINST THE UNITED STATES

The Sixth Amendment to the constitution of the United States provides that "in all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation ...". This constitutional protection is implemented by the requirement of Rule 7 (C) of the Federal Rules of criminal procedure that an indictment or imformation must be plain, concise, and a definite written statement of the essential facts constituting the offense charged.

The United States code, section 1341 and 2, provides, "Whoever having devised or intending to devise any scheme or antifice to defraud or for obtaining money or property by means of false pretense or fraudulent pretenses, representations or promises, ... shall, for the purposes of executing sucn a scheme or antifice or attempting to do so, place in any post office or authorized depository for mail, any matter or thing, whatever to be sent or delivered by the post office department ... shall be fined not more than $1,000 or imprisoned not more than five years or both."

The offense defined by this statute consists of two essential elements; (1) The existence of a scheme to defraud; and (2) the placing or causing to be placed in the post office of a letter, postal card or other mailable matter for the purpose of executing or attempting to execute the scheme. FOURNIER v U. S. 7 CIR, 58 F 2d 3, 5; WOLPA v U. S., 8 CIR

86 F 2d 35, 40; U. S. v YOUNG 232 U. S. 155, 34 S. Ct. 303, 58 L. Ed 548; ROBINS v U. S. 8 CIR, 262 F 126.

That the main object of the indictment, however is to inform the defendant the nature and the cause of the accusation and further to provide the essential facts constituting the offense charged. MR. JUSTICE FIELD, speaking for the Supreme Court of the United States in U. S. v HASS, 124 U. S. 483, 8 S. Ct. 571 said "The object of indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against further prosecution for the same cause; and second to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances". The court there held the indictment bad in that "all the particulars constituting the offense of devising a scheme to defraud are wanting" In DALTON v U. S. 127 F 544, the circuit Court of Appeals for the seventh circuit, dealing with the said section 1341, held that an indictment under that section must not only charge the devising of a scheme or antifice to defraud, to be effected by using mails, but must set out the facts which constituted the specific scheme or antifice so charged by the defendant. In SAVAGE v U. S.

270 F 14, the court said; "The particulars of the scheme are matters of substance; and must be set forth with sufficient certainty ... to ... acquaint the defendant with the charge against him".

In short, the indictment on information must be specific in its charges and necessary allegations cannot be left to inference. RUSSELL v U. S. 1962, 82 S. Ct. 1038, 369 U. S. 749, 8 L. Ed 2d 240. The acts and intent that make up the crime should be set forth in the indictment or information with reasonable particularity of time, place and circumstances. U. S. v CRUISKSHANK 1876, 92 U. S. 542, 558, 23 L. Ed 588.

It is the contention of the defendants that the indictment here under consideration; (1) does not constitute any crime against the United States; (2) is vague and indefinite; (3) charges a scheme to defraud by certain false pretences but with no conformable negation of the pretences alleged; (4) does not contain any allegation that the false pretences were made with intent that they should be acted upon to the damage of the persons to whom they were made; (5) contains no allegation that the persons to whom it is alleged the pretences were made believed them to be true or relied upon them.

The indictment herein charges that on or about and between September 15, 1973 and October 30, 1973 the defendants knowingly devised and intended to devise a scheme and artifice to defraud a certain credit cardholders through-

out the United States by means of false and fraudulent pretenses, well knowing at the time that the pretenses and promises would be false and fraudulent when made. It was further alleged that it was part of the scheme and artifice to defraud that defendants caused to be prepared and sent through the mail envelopes for film processing designated "Prepaid Processing Mailer" to certain cardholders. The alleged false representation consists of the following written statements made by the defendant;

MONEY BACK GUARANTEE

Enclosed is your assortment of prepaid foto factory mailers. One for 12 exposures color film, 2 for 20 exposures color film and one for 20 exposure slide film or super 8 movie film.

When you are ready to develop your film, simply fill out name and address and enclose film - SEND NO MONEY, these are prepaid mailers.

We are certain you will enjoy dealing direct with Foto Factory. Be sure not to lose or destroy these mailers. They are worth $22.10."

It was further alleged that defendants omitted and concealed from the written statements the fact that each account of the credit cardholders was being simultaneously charged $9.95 with the mailing of the prepaid processing mailers.

The questions for us to determine is whether the defendants at some time prior to the mailing of the letter

mentioned in the indictment, had in mind any intention to defraud,whether the people had set forth with particularity the substance and elements of the offense charged and whether the mailing of the letter was used in furtherance of allege scheme to defraud.

Repeated readings of the indictment in question have failed to reveal to this writer in any apt or certain language the particulars of the scheme or artifice described in the said indictment. There is nothing in the indictment to indicate any scheme or artifice by the defendants. The only paragraph of the indictment which could be contended as remotely bearing upon such a particular scheme is paragraph 6 of the indictment which set forth the alleged false representation. It was alleged in the said paragraph that it was part of the scheme to defraud that the defendants omitted from the said written statement the fact that each account of the credit cardholders was being simultaneously charged $9.95.

It must be noted at this juncture that there was no indication in the alleged representation that the services of the defendants would be free of charge. As a matter of fact, it was sufficiently indicated to the interested customers that they are going to pay for it some way or the other and the fact that the defendants did not state the particular form of payment does not itself constitute false representation.

There were no false statements in the "prepaid mailers" sent out and the absence of a false statement in the said mailers negates any charge of fraud. Thus giving to the language of the indictment a sensible construction, it is my considered opinion that the written indictment charges no scheme to defraud by means of false pretenses. The alleged scheme to defraud by means of false pretenses is not sufficiently described in the indictment so as to appraise the defendants as to the nature of the scheme to defraud.

It thus appears that while the people might have succeeded in establishing the existence of probably an iniquitous arrangement whereby defendants who were officers of the said foto factory were to receive the price of their services by charging the account of credit cardholders, it failed to elaborate or to specify with reasonable certainty the existence of the alleged scheme to defraud charged in the indictment. The scheme charged was one to obtain money by false representations from the credit cardholders. The only false representation charged in the indictment was to the effect that the credit cardholders did not know how the defendants were going to be paid. There is no evidence to justify any inference that the representation was false. The evidence conclusively shows that what the defendants did, and what they intended to do was to refrain from disclosing how they were going to be reimbursed. Whether the breach

of trust which the defendants who were offices of the foto factory might have been guilty in not disclosing what it was their duty to disclose is a crime for which they could be punished is a different matter. But to conclude that such a nondisclosure constitutes an offense under Section 1341 and 2, Title 18 U.S.C. is a conclusion which has no support either in law or in fact.

Further, it must be pointed out that to sustain an indictment under 18 U.S.C. Section 1341 and 2, there must be a primer facie evidence of a connection between the mailing and the scheme to defraud. Under the statute, the mailing must be "for the purpose of executing the scheme as the statute requires" KANN v U. S. 323 U. S. 88, 94. In KANN, supra, corporate offices and directors were accused of having set up a dummy corporation through which to divert profits of their own corporation to their own use. As a part of the scheme, the defendants were accused of having fraudulently obtained checks payable to them which were cashed or deposited at a bank and then mailed for collection to the drawee bank. This court held that the fraud was completed at the point at which defendants cashed the checks. "The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them or to any consumation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute

requires." 323 U. S. at 94.

In this instant case, assuming without conceding that there was a scheme to defraud, the fact still remains that the alleged scheme to defraud had nothing to do with the mailing of the letters in that the defendants had the list of the names before the mailing was done and that the mailing of the prepaid mailers did not add any new element to the alleged scheme to defraud and therefore had no connection with it. It is respectfully submitted that the mailings were not sufficiently closely related to the alleged scheme to defraud so as to bring defendants' conduct within meaning of the statute.

It is urged in the alternative that the defendants together with others by an indictment No. 38889 are charged with different offenses in the county of Nassau and the facts in the said indictment formed the basis of the within indictment in that the time, place of occurence and transaction are the same. The offenses charged are identical both in fact and law. The conviction or acquittal under the indictment pending in Nassau County is a bar to prosecution under the instant indictment. Although the two indictments do not constitute double jeopardy in the technical term of that concept but to allow the defendants to be tried twice for the same conduct based on the same facts constitute in my opinion a travesty of justice.

CONCLUSION

Upon the foregoing facts, defendants respectfully request an order dismissing the within indictment pursuent to RULE 12 (b) (1) of the federal rules of criminal procedure on the grounds that the facts alleged in the indictment do not constitute a crime under Title 18 U.S.C. Section 1371 and 2 and on further grounds that since defendants are facing trial in Nassau County based on the same conduct it would be wrong and unfair to proceed against them on the same facts.

Respectfully submitted,

ROBERT RIVERS
Attorney for Complainant
Office & P.O. Address
287 Post Avenue
Westbury, New York 11590
(516) 333-3555

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CLERK'S OFFICE U.S. DISTRICT COURT E.D. N.Y.
JAN 27 1975
TIME A.M. P.M.

- -x

UNITED STATES OF AMERICA, :

Plaintiff :

-against- :

STEPHEN LENT and DOMINICK SEMINARA, :

Defendants :

- -x

NOTICE OF MOTION

Criminal No. 74/CR 765

S I R S :

PLEASE TAKE NOTICE that upon the annexed affirmation of ALBERT R. PINCUS, ESQ., the attorney for the defendant, STEPHEN LENT, herein dated January 27, 1975, and upon all of the proceedings herein, the undersigned will move at a criminal term for motions before the Honorable Judge Bartels held in the Eastern District Courthouse located in the Federal Building at Cadman Plaza in Brooklyn, New York on the 3 day of February, 1975 at 9:30 A. M. in the forenoon of that day or as soon thereafter as counsel can be heard, for an order allowing the defendant the following relief:

(A) For an order to inspect the proceedings before the Grand Jury to ascertain that the evidence presented before that Grand Jury was legally sufficient to establish the true bill.

(B) For an order of discovery.

(C) For copies of any and all statements, declarations or conversations or recordings of all statements, declarations or conversations made by the defendant to any public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him.

(D) For an order directing that the government produce and give defense counsel all exculpatory information of whatever form, source and nature that tends to exculpate the defendant, either through an indication of his innocence or through the

impeachment of the government's witnesses.

(E) For an order suppressing the evidence as being illegally obtained.

(F) For such other and further relief as to this Court may seem just and proper.

Dated: Levittown, New York
January 27, 1975

Yours etc.,

ALBERT R. PINCUS
Attorney for Def., LENT
Office and P. O. Address
2950 Hempstead Turnpike
Levittown, New York 11756
(516) 731-4141

TO: UNITED STATES ATTORNEY
Eastern District of New York
Federal Building
Brooklyn, New York 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

Plaintiff :

-against- : AFFIRMATION

STEPHEN LENT and DOMINICK SEMINARA, :

Defendants :

----------X

STATE OF NEW YORK)
) SS:
COUNTY OF NASSAU)

ALBERT R. PINCUS, an attorney at law, duly admitted to practice before the Bar of this Court, hereby affirms that the following statements are true under penalty of perjury:

1. That he is the attorney of record for the defendant, STEPHEN LENT, herein.

2. As such he is fully familiar with the facts and circumstances of the matter herein, and submits this affirmation in connection with an omnibus motion for certain relief. The relief requested is as follows:

(A) For an order to inspect the proceedings before the Grand Jury to ascertain that the evidence presented before that Grand Jury was legally sufficient to establish the true bill.

(B) For an order of discovery.

(C) For copies of any and all statements, declarations or conversations or recordings of all statements, declarations or conversations made by the defendant to any public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him.

(D) For an order directing that the government produce and give defense counsel all exculpatory information of whatever form, source and nature that tends to

exculpate the defendant, either through an indication of his innocence or through the impeachment of the government's witnesses.

(E) For an order suppressing the evidence as being illegally obtained.

(F) For such other and further relief as to this Court may seem just and proper.

3. The defendant herein has indicated to your affiant that during the period of time alleged in the indictment, the defendant, although nominally the president of Foto Factory, Ltd., was not involved in the day to day running of the corporation. The defendant further informs your affiant that during the period of time expressed in the indictment, he had transferred the reins of control of the corporation to others, and in fact was not present on or about the premises of Foto Factory, Ltd. As such, it is your affiant's firm conviction, the defendant herein was not associated with any part of the plan expressed in the indictment, and as such the indictment is not proper as to the defendant.

4. In this regard your affiant is requesting that this Court allow your affiant to examine the proceedings before the Grand Jury to determine the sufficiency of the proceedings as a matter of law or in the alternative to allow the Court to examine the minutes of the proceedings to establish the sufficiency of the proceedings as to the defendant, STEPHEN LENT.

5. Your affiant requests discovery with regard to the following:

O.K. (A) The specific amount of each transaction in counts 1 through 50.

O.K. (B) The specific post office or other facility where the materials enunciated in counts 1 through 50 entered the mails.

O.K. (C) The date, time and place of each delivery of mail.

O.K. (D) Your affiant requests permission to examine the materials transmitted through the mails.

O.K. (E) To whom and by whom payment was made with regard to the materials in counts 1 through 50.

(F) Your affiant requests copies of the credit card sales slips as shown in paragraph 8 of the indictment.

6. Your affiant prays that he be furnished with all written or recorded statements made by the defendant to a public servant engaged in law enforcement activity or to any person acting under direction of such a law enforcement official, which statements are in the possession, custody and control of the government, in which are known to him to exist, or should in the exercise of due diligence on his part become known to him to exist.

7. The defendant further moves this Court to grant an order compelling the government to disclose to the defendant, and in the case of any books, records, papers, reports, testimony, statements, photographs or other tangible items to produce them to deliver for inspection and copying by the defendant all evidence in the possession, custody and control of the government, the existence of which is known or in the exercise of due diligence became known to the government, which material is of an exculpatory nature within/penumbra of the Brady vs. Maryland, 373 U. S. 83. This evidence, which is referred to as "Brady" material is evidence which may be favorable to the defendant, and material to the issue of guilt or innocence, or bears upon and could occasionally weaken or effect any evidence proposed to be introduced against the defendant by the government, or bears any material degree to the charge in the indictment, or is relevant to the subject matter in the indictment and the prosecution thereunder or, in any manner which may aid the defendant in the ascertainment of the truth. Often, there are quite a number of witnesses who have furnished statements or information to the government which are favorable to the defendant, but who might not be called upon at trial. The statements from those witnesses and the information gleaned by the investigation should be turned over to the defendant at this point so that those potential witnesses may be interviewed by the defense counsel in order to determine in advance of trial, whether these witnesses are on the behalf of the defendant, and should be called in fact on the behalf of the

defense. If the defense is forced to wait until the time of trial, it may be too late to conduct interviews or to even contact those witnesses, or to arrange for those witnesses to be subpoenaed on behalf of the defense. Therefore, it is imperative that the evidence in the government's file which is favorable to the defense, be disclosed immediately so that arrangements may be made for these witnesses to be called during the course of the trial. The disclosure and production requested herein should be made without regard to whether or not the evidence to be disclosed and produced is deemed to be admissible at the time of the trial of this action. In view of the fact that the duty imposed upon the people by "Brady" Supra to disclose to the defendant information favorable to the defendant and that the obligation is a continuing obligation, the defendant specifically reserves the right to make additional requests for such material at any time before trial.

8. The defendant has informed your affiant that prior to the time of the termination of the company known as Foto Factory, Ltd. and in connection with a pending bankruptcy, the records of said corporation were sealed. The defendant has further informed your affiant that he gave no one permission, nor does he know that anyone was given permission to examine those books and records. As such, it is the defendant's firm belief, on information and belief, that the government conducted a search of the premises of Foto Factory, Ltd., and in connection with that search seized certain materials.

9. In this regard, the defendant demands that the Court order that a hearing be held immediately prior to the trial of this matter to determine the admissibility of the evidence as seized from the premises of Foto Factory, Ltd.

WHEREFORE, your affiant prays for the relief requested in consonance with the above.

Albert R. Pincus

ALBERT R. PINCUS

Dated: Levittown, New York
January 27, 1975.

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.

Dated: .....
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

☐ Individual Verification — in the action herein: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 19 .....
(Print signer's name below signature)

.....

STATE OF NEW YORK, COUNTY OF NASSAU ss:

MICHAEL J. MARCANTANO being sworn says: I am not a party to the action, am over 18 years of age and reside at Dix Hills, New York

On January 27, 1975, 19 , I served a true copy of the annexed NOTICE OF MOTION in the following manner:

☐ Service By Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

☒ Personal Service — by delivering the same personally to the persons and at the addresses indicated below:

UNITED STATES ATTORNEY
Eastern District of New York
Federal Building
Brooklyn, New yOrk

Sworn to before me on January 27, 19 75

Laura A Russo
...of New York
...County
...March 30, 19 76

MICHAEL J. MARCANTANO (Signature)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-against-

STEPHEN LENT and DOMINICK SEMINARA,

Defendants

NOTICE OF MOTION

ALBERT R. PINCUS

Attorney for Defendant, LENT

2950 HEMPSTEAD TURNPIKE
LEVITTOWN, NEW YORK 11756
(516) 731-4141

To: UNITED STATES ATTORNEY

Attorney(s) for Plaintiff

Service of a copy of the within Maria Bonach 1/27/75 *is hereby admitted.*

Dated: .....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY — *that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on* 19

☐ NOTICE OF SETTLEMENT — *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on* 19 , *at* M.

Dated:

ALBERT R. PINCUS

Attorney for

2950 HEMPSTEAD TURNPIKE
LEVITTOWN, NEW YORK 11756

To:

Attorney(s) for

N 912 CL

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FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
JAN 28 1975
TIME A.M.
P.M.

JWR:HJF:mb
F.#741,387

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

STEPHEN LENT and
DOMINICK SEMINARA,

Defendant(s)

NOTICE OF READINESS FOR TRIAL

Court Docket No.

74 CR 765

S I R (S) :

PLEASE TAKE NOTICE that the United States is ready for trial.

Since the defendant(s) ~~is~~/are not in custody a trial date will be requested as soon as the case can be reached by the Court, subject to receiving three days' advance notice of the actual date for trial.

Dated: Brooklyn, New York
January 28, 1975.

Yours, etc.
DAVID G. TRAGER
~~EDWARD X DONNELLY~~
United States Attorney
Eastern District of New York

By Harold J. Friedman
HAROLD J. FRIEDMAN
Assistant U. S. Attorney

TO:

HONORABLE JOHN R. BARTELS
United States District Judge
~~Eastern District of New York~~

Attorney(s) for Defendant(s)

Albert Pincus, Esq.
2950 Hempstead Turnpike
Levittown, New York 11756

Robert Rivers, Esq.
287 Post Avenue
Westbury, New York 11590

(6

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

MARIA BONADE, being duly sworn, says that on the _____ day of January 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a NOTICE OF READINESS FOR TRIAL of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Hon. John R. Bartels U. S. District Judge 225 Cadman Plaza East Brooklyn, N. Y. 11201	Albert Pincus, Esq. 2950 Hempstead Avenue Levittown, N.Y. 11756	Robert Rivers, Esq. 287 Post Avenue Westbury, N.Y. 11590

Maria Bonade

Sworn to before me this
28th day of January 1975

JUANITA MAYO
Notary Public, State of New York
No. 24-4501911
Qualified in Kings County
Commission Expires March 30, 1975

AFFIDAVIT OF PERSONAL SERVICES

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

_____, being duly sworn, says that he is employed in the office of the United States Attorney for the Eastern District of New York. That on the _____ day of _____, he served a true copy of the annexed _____ on the office of _____ attorney for _____ herein, located at _____, Borough of _____, City of New York, by leaving a true copy of same with his clerk or other person in charge of said office.

_____

Sworn to before me this
day of

_____

JWR:HJF:mb
F.#741,387

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - -

UNITED STATES OF AMERICA

-against-

DOMINICK SEMINARA and
STEPHEN LENT,

Defendants.

- - - - - - - - - -

AFFIDAVIT

74 CR 765

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
JAN 31 1975
TIME A.M.
P.M.

STATE OF NEW YORK)
)
COUNTY OF KINGS)

DAVID A. KRASULA, being duly sworn, deposes and says:

(1) I am a Postal Inspector employed by the United States Postal Service, duly appointed according to law and acting as such, and that I am assigned to the above-captioned case and I am fully familiar with the facts thereof.

(2) I am not aware of any property being seized by the Federal Government from Dominick Seminara, Stephen Lent or Foto Factory Limited, the corporation that they operated in 1973.

(3) Pursuant to an order of the Bankruptcy Court in the Eastern District of New York (Rudin, J.) certain mail matter consisting of prepaid film mailers directed to Foto Factory Limited for processing was initially held by the Postal Service pending a decision by the Bankruptcy Court as to the ability of Foto Factory Limited to process said mailers. Subsequently, the Bankruptcy Court ordered that all such mailers held by the Postal Service be returned to their original senders.

(4) I had the opportunity to examine various documents in the possession of Leonard Schwartz, attorney for the trustee in the bankruptcy action involving Foto Factory Limited.

(5) None of the mail matter detained by the Postal Service nor any of the documents that I examined at attorney

Schwartz' office were seized from the defendants.

DAVID A. KRASULA
Postal Inspector
U. S. Postal Service

Sworn to before me this
30th day of January 1975.

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 19[illegible]

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

_____, being duly sworn, says that on the _____ day of _____, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a _____ of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

_____

_____

_____

Sworn to before me this
day of

_____

_____

AFFIDAVIT OF PERSONAL SERVICES

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DAVID A. KRASULA, being duly sworn, says that he is employed in the office of the United States Attorney for the Eastern District of New York. That on the 30th day of January 1975, he served a true copy of the annexed Affidavit and Memorandum of Law on the office of Albert Pincus, Esq. & Robert Rivers, Esq. Stephen Lent Levittown, N.Y. Westbury, N.Y.
attorneys for & Dominick Seminara, located at Westbury & Jamaica
_____, ~~Borough of~~ County of Nassau, ~~City~~ State of New York, by leaving a true copy of same with his clerk or other person in charge of said office.

_____

Sworn to before me this
31 day of January 1975
Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

CRIMINAL Action No. 74 CR 765

UNITED STATES DISTRICT COURT
Eastern District of New York

UNITED STATES OF AMERICA

—Against—

DOMINICK SEMINARA and
STEPHEN LENT,

Defendant.

AFFIDAVIT

DAVID G. TRAGER
United States Attorney,
Attorney for U.S.A.
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-SM-8-73-7355

HAROLD J. FRIEDMAN
Assistant U.S. Attorney
596-3012

8

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
JAN 31 1975
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

-against-

DOMINICK SEMINARA and
STEPHEN LENT,

Defendants.

- X

74 CR 765

GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO THE DEFENDANTS
DOMINICK SEMINARA AND STEPHEN LENT'S
MOTIONS TO DISMISS THE INDICTMENT.

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

HAROLD J. FRIEDMAN
Assistant U.S. Attorney
(Of Counsel)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -

UNITED STATES OF AMERICA

-against-

74 CR 765

DOMINICK SEMINARA and
STEPHEN LENT,

Defendants.

- - - - - - - - - - - - - - - - - -

GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS
DOMINICK SEMINARA AND STEPHEN LENT'S
MOTIONS TO DISMISS THE INDICTMENT.

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

HAROLD J. FRIEDMAN
Assistant U. S. Attorney
(Of Counsel)

Preliminary Statement

Defendants Stephen Lent and Dominick Seminara were named in a fifty count indictment in this district returned on December 9, 1974. They are charged with mail fraud in violation of 18 U.S.C.§§1341 and 2. The indictment alleges that the defendants devised and carried out a scheme to defraud 12,000 BankAmericard and Master Charge credit card holders and three banks. It is further alleged that the defendants used the mails to send to these credit card holders "prepaid processing mailer"[s] and a written statement which made no mention of the fact that simultaneous with these mailings the card holders would be charged $9.95 on their credit card accounts. As a further part of the scheme, the indictment alleges that the defendants did charge the card holders' accounts $9.95 each simultaneous with the mailings without the knowledge or consent of the cardholders. The indictment further alleges that the defendants withdrew all but a nominal sum from the merchant credit card bank accounts. Finally, the indictment alleges that the defendants gave false and misleading statements to credit card holders who inquired about being charged $9.95 on their credit card accounts.

On December 18, 1973, the defendants and others were named in an eighteen count Nassau County, New York indictment charging them with forgery in the second degree

and grand larceny in the second degree, apparently arising in part out of the same transactions as those alleged in the Federal indictment. The defendants pled guilty on January 3, 1975 to grand larceny third degree, a Class E felony. Sentencing is scheduled for February 28, 1975.

POINT I

THE MOTION OF DEFENDANT DOMINICK SEMINARA

Defendant Seminara moves this court for an order pursuant to Rule 12(b)(1) of the Federal Rules of Criminal Procedure to dismiss the indictment claiming that (A) the indictment is uncertain, illogical, vague, indefinite and does not set forth an offense known to the law; (B) certain property of the defendants was illegally seized and improperly presented to the grand jury that returned this indictment; (C) since the Nassau County indictment against the defendants arises out of the same transactions as the Federal indictment that the defendants are subject in fact or at least in spirit to double jeopardy; and (D) the mailings of the "prepaid processing mailer"[s] as alleged in paragraphs 5 and 6 of the indictment and the accompanying written statement is not a sufficient basis for mail fraud jurisdiction under 18 U.S.C. §1341.

(A)

Defendant Seminara's claim that the indictment is vague and ambiguous is unfounded. Rule 7(c) of the Federal Rules of Criminal Procedure requires an indictment to be

"plain, concise and definite" and to contain "the essential facts constituting the offense charged." The indictment which speaks for itself meets the requirements of Rule 7(c) and the defendants have been given fair notice of the charges against them. I Wright, Federal Practice and Procedure §123; 1973 Pocket Part, p.50.

(B)

Defendant Seminara alleges that the government illegally seized property from the defendants and then introduced this evidence before the grand jury. While the exclusionary rule does not apply to grand jury proceedings, United States v. Calandra, 94 S.Ct. 613, 620-21 (1974) in this case there was no property seized by the government that was introduced before the grand jury. See affidavit of Inspector David A. Krasula, United States Postal Service, annexed hereto.

(C)

The Federal indictment which may have arisen out of the same transactions as the Nassau County indictment clearly does not place the defendants in double jeopardy nor is it in violation of the due process clause.

The United States may prosecute a defendant under Federal law for acts which the defendant is being prosecuted for under State law. Abbate v. United States, 359 U.S. 187 (1959); United States v. Lanza, 260 U.S. 377 (1922). Indeed, this very court held precisely the same way in United States v. Wapnick, 198 F. Supp. 359 (E.D.N.Y. 1961), affirmed per

curiam 315 F.2d 96 (2d Cir. 1963), cert. denied 374 U.S. 829, rehearing denied 375 U.S. 871, rehearing denied 383 U.S. 923 (1966).

While the Nassau County indictment is predicated on banks being defrauded, the Federal indictment focuses on the use of the mails on a nationwide basis in furtherance of a fraudulent scheme and the Federal indictment is directed at preserving the integrity of the United States mails.

(D)

Defendant Seminara claims that the use of the mails as alleged in paragraphs 5 and 6 of the indictment is not sufficiently closely related to the alleged fraudulent scheme and thus there is no violation of 18 U.S.C. §1341. The fact that the defendants chose to and in fact did use the mails to send the "prepaid Processing mailer"[s] and the written statement set forth in paragraphs 5 and 6 of the indictment to lull and confuse the victims into believing that they would not be charged any money when in fact they were charged $9.95 without their consent or knowledge, is a clear violation of 18 U.S.C. §1341. United States v. Sampson, 371 U.S. 75, 80-81 (1962). See United States v. Maze, 94 S.Ct. 645 (1974) where a contrary result was reached where the defendant used stolen credit cards at several motels. There, the motel operators, not the defendant, used the mails "for the purpose of executing such a scheme or artifice." 94 S.Ct. at 651. In the case at bar, it is alleged that "for the purpose of executing such a scheme or artifice" the defendants used the mails as set forth in paragraphs 5 and 6 of the indictment. Under Maze, if the allegations of the indictment are proved there is a violation

of 18 U.S.C. §1341.

POINT II

THE MOTION OF DEFENDANT STEPHEN LENT

Defendant Lent demands that he be allowed to examine all grand jury testimony to determine if the indictment was legally sufficient. It is well settled that there is a very strong presumption that an indictment was properly returned. Costello v. United States, 350 U.S. 359 (1956) I Wright, Federal Practice and Procedure §111 P. 201. Defendant Lent has not shown any grounds "that may exist for a motion to dismiss the indictment because of matters occurring before the grand jury" as required by Rule 6(e) of the Federal Rules of Criminal Procedure. A bare demand to inspect grand jury minutes, which must be kept secret absent a compelling interest, is insufficient to compel an order that the grand jury minutes be turned over to the defendant. As the Supreme Court noted in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400 (1959), "The burden ... is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy." See also United States v. Procter and Gamble Co., 356 U.S. 677 (1958). Defendant Lent has failed to show that any particularized need exists for the grand jury minutes which would outweigh the need for maintaining the secrecy of such minutes.

CONCLUSION

The motions of the defendants should be denied.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

HAROLD J. FRIEDMAN
Assistant U. S. Attorney
(Of Counsel)

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
JUN 24 1975
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

STEPHEN LENT AND DOMINICK SEMINARA,

Defendants.

MOTION FOR ADJOURNMENT

74 CR 765

S I R:

Defendant DOMINICK SEMINARA moves for an adjournment of the trial of this cause of action until July 8, 1975, to enable him to investigate, evaluate and otherwise prepare a defense to the new information supplied by the U.S. Attorney, which information, allegedly inculpatory, was received by his attorney, ROBERT RIVERS, on the 23rd day of June, 1974, the very day before the instant action is scheduled for trial, for the folbwing reasons:

(1). That on January 31, 1975, the United States District Court, by the HON. JOHN R. BARTELS did order the office of the United States Attorney to supply the defendants with statements made by them for the purpose of discovery.

(2). That on January 31, 1975, the Court indicated to ROBERT RIVERS personally as follows:

> "You are too late, Mr. Rivers. Your motion is decided. I did grant portions of it as to the bill of particulars and statements made by the defendants."

(3). That on January 31, 1975, the following exchange is recorded in the minutes between the Court and HAROLD FRIEDMAN, Assistant U.S. Attorney:

MR. FRIEDMAN: I am just waiting for Mr. Rivers--

THE COURT: You tell him that he is going to get a bill of particulars and he is also entitled to statements and exculpatory evidence and I don't know what he means by "evidence illegally seized."

(4). That on Monday, June 23, 1975, the offices of ROBERT RIVERS and ALBERT PINCUS received through the mail copies of three (3) letters, allegedly statements made by the defendants, and notice of other material which is now, on the eve of trial, "available for your inspection." (See copies of letters and envelope annexed hereto and incorported herein as Exhibits "A" through "F".

(5). That the Assistant U.S. Attorney explains this delay with the excuse that the letter from defendant SEMINARA "has recently come to my attention." That the said letter is dated November 15, 1973 (Exhibit "A").

(6). That counsel for the defense has personally met with U.S. Attorney, DAVID TRAGER on this matter and that on separate occasions counsel has met with Assistant U.S. Attorney HAROLD FRIEDMAN on this matter and on none of these occasions was any mention made of the newly produced evidence.

(7). That in light of the new evidence received by the office of ROBERT RIVERS on June 23, 1975, the very day before trial of the action, the defense finds it necessary to evaluate the meaning of the evidence which was thrust upon us and formulate a theory of defense in order to respond to that evidence.

(8). That the evidence received by this office on the eve of trial may throw a new light over the defense theory vis-a-vis the alleged personal involvement of the defendant DOMINICK SEMINARA.

(9). That the defendants have exercized due diligence in attempting to secure any statements such as those attached, but are surprised by the action of Assistant U.S. Attorney HAROLD FRIEDMAN. That counsel cannot safely conduct the defense of DOMINICK SEMINARA without a reasonable time to investigate the alleged letter by him.

(10). That unless the defense is granted a reasonable time to adequately investigate and evalute the material thrust upon us on the eve of trial, the rights of the defendant DOMINICK SEMINARA will be unreasonably prejudiced and he will be denied his constitutional right to be informed of the charges against him, to have a reasonable opportunity to prepare to meet such charges, and to a fair trial, which are guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

WHEREFORE, the defendant DOMINIC SEMINARA prays the Court for an adjournment of the trial of this cause until July 8, 1975, or for such other reasonable time as the Court may order.

Dated: Westbury, New York
June 23, 1975

Yours, etc.,

ROBERT RIVERS
Attorney for Defendant
Office & P.O. Address
287 Post Avenue
Westbury, NY 11590
(516) 333-3555

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

AFFIDAVIT

- against -

STEPHEN LENT AND DOMINICK SEMINARA,

Defendants.

----------X

STATE OF NEW YORK)
COUNTY OF NASSAU) SS:

DOMINICK SEMINARA, being duly sworn, deposes and says:

That I am a defendant in this action and make this affidavit in my own behalf.

That I have read the motion for adjournment and the allegations and statements therein contained are true.

That I was away from home on Monday, June 23, 1975, and returned late that night and have not spoken to my attorney prior to this date, Tuesday, June 24, 1975, concerning the "evidence" he received on Monday, June 23, 1975.

That the motion for adjournment is made to enable my attorney and myself to confer and prepare a defense and to secure the rights guaranteed by the Fifth and Sixth Amendments, and that the motion at bar is not made for the purpose of vexation or delay.

DOMINICK SEMINARA

Sworn to before me this 24th
day of June, 1975.

ROBERT RIVERS
NOTARY PUBLIC, State of New York
No. 30-3296477
Qualified in Nassau County
Commission Expires March 30, 1977

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

RED:HJF:mb
F.#741,387

United States Department of Justice

6/21/2

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

June 20, 1975

Robert Rivers, Esq.
287 Post Avenue
Westbury, New York 11590

Re: U.S. v. Stephen Lent and
Dominick Seminara
74 CR 765

Dear Mr. Rivers:

The enclosed letter from Dominick Seminara to the Federal Trade Commission has recently come to my attention.

In addition, I wish to inform you that we have in our possession three (3) metal cabinets containing Master Charge and BankAmericard sales slips previously in the possession of the Nassau District Attorney's Office. These sales slips are available for your inspection.

Very truly yours,

DAVID G. TRAGER
United States Attorney

By: Harold J. Friedman
Assistant U. S. Attorney

Enc.

cc: Albert Pincus, Esq.

"A"

FOTO FACTORY
FACTORY
FACTORY

November 15, 1973

Federal Trade Commission
New York Regional Office
22nd Floor Federal Bldg.
26 Federal Plaza
New York City, New York 10007
Attn: Mr. Angelo Presti

Dear Mr. Presti,

Enclosed are the dispositions on all of the complaints you sent me on November 12, 1973. Apparently, most of the complaints crossed in the mail with the methods of satisfaction (either by refund or shipment). As to the orders relative to the mix up of the introductory offers, we feel that this will definitely be under control in a relatively short period of time. We are zeroing in on the list involved. We are in the process of mailing the enclosed letter, which will hopefully assist us in retrieving the prepaid offers as well as clearing up the consumers' accounts. Incidentally, the enclosed letter is a revision of the one I gave you when you were here. This was done at the request of the BankAmericard bank we are working with. As to orders received relative to unshipped merchandise, I am in the process of cleaning them up as quickly as possible.

All other consumer complaints are under my direct surveillance and please be rest assured, I will do my utmost to make sure each and every consumer has been completely satisfied. As you know, I am also organizing the photo lab in order to properly process the incoming films as fast as possible. I have tackled that problem and am three quarters of the way there.

Mr. Presti, I certainly appreciate your patience and understanding in this matter. I will not disappoint the Commission. I have also tried to contact the Nassau County Office of Consumer Affairs and the Better Business Bureau in the hope of giving them a clear understanding of what is happening. It seems my willingness to cooperate is being ignored in those areas and I really cannot understand why.

At this juncture, I basically am concerned in serving the interests of the consumer; therefore, you have my full, complete cooperation.

Sincerely,

Dominick Seminara
President

DS/ds

70

"B"

240 MAPLE AVENUE, ROCKVILLE CENTRE, N.Y. 11570
6814 WOODMAN AVENUE, VAN NUYS, CALIF. 91405

[illegible]

[illegible]

[illegible]

FACTORY
FOTO FACTORY
FACTORY

NAME	DISPOSITION
Susan Rice	Check refund 11/8/73, #141
Alfred Fressola	Check refund 11/8/73, #142
Joseph Wittbred	Check refund 11/8/73, #143
Rev. John Pressey	Check refund 11/9/73, #138
Dave Pintwas	Check refund 10/12/73, #4481
J.R. Yotz	Merchandise shipped 11/9/73
Mrs. C.S. Florio	Film tracer sent 11/10/73
David Welborn	Film sent 10/15/73
Anne Marie Redente	Merchandise shipped 11/9/73
Irwin Perton	Merchandise shipped 11/9/73
A.B.C. Whipple	Film tracer sent 11/14/73-
Martin Blumenthal	Film tracer sent 11/14/73
S. Wallach	Film tracer sent 11/14/73
Anthony Schmid	Check refund 11/15/73, #180
Mrs. Claire Hunt	Check refund 11/15/73, #181
William O'Connell	Check redund 11/15/73, #182
Grace Drumm	Check redund 11/15/73,# 183
MorresAllalouf	Check refund 11/15/73, #184
H. Lowenthal	Chec krefund 11/15/73, # 185
Dennis Petty	Chec k refund 11/15/73, #186
Albert Capone	Check refund 11/15/73, #187
Gerald Hoffman	Check refund 11/15/73, #188
Marc Nemeth	Check refund 11/73/15, #189
William Johns	Check refund 11/15/73, #190
Ralph McCoy	Check refund 11/15/73, #191
John Hamilton	BankAmericard credited 11/14/73
M. Seidner	Master Charge credited 11/14/73
Anne Marie Redente	Account credited 11/14/73
B. Pappas	Master Charge credited 11/14/73
John Jung	Master Charge credited 11/14/73
Shaun Haas	See attached letter

FACTORY

Edward Jaster	Master Charge credited October 19
Willaim O'Connell	Master Charge credited 10/24/73
Gerald Aubin	Merchandise shipped 11/15/73

Sincerely,

Donna Scuoteguazza

Donna Scuoteguazza
Customer Service

73

FACTORY
PHOTO FACTORY
FACTORY

November 15, 1973

Mr. S. Haas
471 Warbler Lane
Madison, Wisconsin

Dear Mr. Haas,

We are in receipt of a letter from you to the Attorney General through the Federal Trade Commission. We would like to get the matter cleared up immediately but have been unable to locate your original order as you did not specify the type of film you ordered. We would greatly appreciate it if you would simply note the type of film at the bottom of this letter and send it bac k to my attention.

Thank you for your cooperation.

Sincerely,
Donna Scuotegurzza
Customer Service

cc/ Federal Trade Commission

74

"E"

DEPARTMENT OF JUSTICE
EASTERN DISTRICT OF NEW YORK
RETURN IN FIVE DAYS TO
OFFICE OF
UNITED STATES ATTORNEY
BROOKLYN, NEW YORK 11201

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE $300

SPECIAL DELIVERY

SPECIAL DELIVERY

JUS 431
POSTAGE AND FEES PAID
U. S .DEPARTMENT OF JUSTICE

U.S. MAIL

BROOKLYN, N.Y.
JUN 24
1

ROBERT RIVERS esq.
287 POST AVE
WESTBURY N.Y. 11590

44

NOTICE OF ENTRY

Sir : PLEASE TAKE NOTICE that the within is a true-certified-copy of a

duly entered in the office of the clerk of

on 19

Dated: 19

Yours, etc.,

ROBERT RIVERS

meys for

Office and Post Office Address
287 POST AVENUE
Westbury, New York 11590

To

Attorney for

NOTICE OF SETTLEMENT

Sir : PLEASE TAKE NOTICE that

of which the within is a true copy will be presented for settlement to Mr. Justice

one of the Justices of the within named Court at

he day of 19

at M.

Dated: 19

Yours, etc.,

ROBERT RIVERS

Attorneys for

Office and Post Office Address
287 POST AVENUE
Westbury, New York 11590

To

Attorney for

Index No. 19

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

DOMINICK SEMINARA AND STEPHEN LENT,

Defendants.

NOTICE OF MOTION

ROBERT RIVERS

Attorneys for Dominick Seminara

Office and Post Office Address
287 POST AVENUE
Westbury, New York 11590
(516) ED 3-3555

To Esq.

Attorney for

Service of a copy of the within

is hereby admitted.

Dated, N. Y., 19

Attorney for

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -X

UNITED STATES OF AMERICA,

-against-

STEPHEN LENT and DOMINICK SEMINARA,

Defendants.

- -

MOTION TO DISMISS INDICTMENT

FILED
IN CLERK'S OFFICE
DISTRICT COURT E.D. N.Y.
JUN 24 1975
TIME A.M.
P.M.

Cr. No. 74CR 765

Now comes the above-named defendant, STEPHEN LENT, by his attorney, ALBERT R. PINCUS, upon the affidavits of ALBERT R. PINCUS, counsel for defendant, LENT, sworn to the 22nd dayof June, 1975, and upon the affidavit of STEPHEN LENT, sworn to the 23rd day of June, 1975, and upon the indictment and all the pleadings and proceedings in this action, and moves the Court for an order requiring the United States Attorney for the Eastern District of New York, to show cause before this Court at room of the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, City, State and Eastern District of New York, on the day of , 1975, at o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made quashing and dismissing each count of the indictment upon the ground that by indicting the defendant herein, STEPHEN LENT, and waiving indictments against two other officers of Foto Factort Ltd. who were given the opportunity to appear before the Grand Jury, that the Grand Jury

U S v Elkins
2497 Supp 236 1961

proceeded on a path of invidious discrimination and selective enforcement against STEPHEN LENT by not allowing him to appear before the Grand Jury after he had been promised the same by the United States Attorney.

Sufficient reason appearing therefor, let service of a copy of this order, together with the affidavit upon which the same is based, upon the United States Attorney for the Eastern District of New York by P.M. on , 1975, be deemed good and sufficient service.

Dated: Brooklyn, New York,
June , 1975.

United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -X

UNITED STATES OF AMERICA,

-against-

STEPHEN LENT and DOMINICK SEMINARA,

Defendants.

- -X

AFFIDAVIT

Cr. No. 74CR 765

STATE OF NEW YORK)
) ss:
COUNTY OF NASSAU)

ALBERT R. PINCUS, being duly sworn, deposes and says:

1. That he is the attorney for STEPHEN LENT, one of the defendants in the above entitled case, against whom indictment No. 74CR 765 charging the defendant with viilation of Title 18, United States Code, Sections 1341 and 1342, alleging mail fraud was filed in the Eastern District of New York, on December 9, 1974.

2. The indictment was based upon invidious discrimination and selective enforcement.

(a) On November 13, 1974, defendant, STEPHEN LENT, was mailed a subpoena directing him to appear before the Federal Grand Jury on November 22, 1974. See annexed hereto Exhibit A.

(b) On November 19, 1974, Harold J. Friedman, an Assistant United States Attorney in the office of the United States Attorney, Eastern District of New York, corresponded with your deponent

with respect to the subpoena. See Exhibit B annexed hereto.

(c) That in the interim period between November 13, 1974 when the subpoena was issued and when the indictment was handed down on December 9, 1974, two other officers of Foto Factory Ltd. testified before the Federal Grand Jury.

(d) That on December 6, 1974, your deponent wrote a letter to Harold J. Friedman, Assistant United States Attorney for Eastern District of New York confirming conversations had between us on December 5 and December 6, 1974.

(e) That in the third paragraph of said letter on December 6, 1974, it was stated: "This will also confirm the fact that my client's appearance was waived by your office in lieu of the enclosed affidavit". See annexed hereto Exhibits C,(letter of December 6,) and D,(affidavit of defendant, LENT.)

(f) That prior to waiving his appearance the United States Attorney's office had agreed to pay for defendant's, LENT, transportation from Florida, where he is being treated for psoriasis (see Exhibit E annexed), to New York in order that he appear before the Grand Jury.

(g) That on December 11, 1974, Harold J. Friedman, the Assistant United States Attorney, handling this case, again corresponded with your deponent, who responded on December 23, 1974, regarding Mr. Lent's affidavit. See annexed hereto Exhibit F and Exhibit G.

(h) That in fact while the United States Attorney was considering Mr. Lent's affidavit and waiving his appearance before the Grand Jury, the Grand Jury had already indicted defendant, LENT, and his co-defendant on December 9, 1974, while waiving indictments against two other corporate officers. See Exhibit H annexed hereto.

(i) That defendant, LENT, was in fact never given the opportunity to appear before the Grand Jury.

(j) That by discriminating against defendant, LENT, by not allowing him to appear before the Grand Jury and waiving indictments against the two other corporate officers, the requirements of Yick Wo v. Hopkins 118U.S.356, 6S.Ct.1064,30 L.Ed. 220 (1885) have been satisfied. In that case it was stated:

> "Though a law be fair on its face and impartial in appearance, yet, if it is administered by public authority with an evil eye and unequal hand, so as practically to make illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

This position was later reaffirmed in Skinner v. Oklahoma ex rel Williamson 316 U.S.525, 62S.Ct.1110,1113,86 L.Ed. 1655 (1942). Additionally, it has been held that

> "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious discrimination as if it had selected a particular

race or nationality for oppressive treatment",

McLaughlin v. State of Florida, 379U.S.185, 85S.Ct. 283, 290, 13 L.Ed.2d 222 on remend 172 So.2d 460 (1964).

More recently in Mason v. Henderson, 337F. Supp.35 (Dist.Ct.La, 1972),it was held

"Underlying principle of equal protection of laws is applicable to actions of prosecutors and public officials."

(k) Based upon the fact that all of the suspected individuals were in the same class and participated in similar ways in the alleged violation of the law, the Grand Jury by indicting only Lent and one other co-defendant and waiving indictments against the others who did in fact testify before the Grand Jury, the Grand Jury followed a deviate path of invidious discrimination and selective enforcement.

(l) That in view of the above decisions, it is clear that a defendant is always entitled to at the very least, equal protection of the law and therefore equal opportunity to protect himself, and this right was not given to this defendant and he was in fact deprived of his equal protection under the law, which should have the effect of rendering the indictment defective.

(3) THAT NO PREVIOUS APPLICATION FOR THE RELIEF SOUGHT HEREIN HAS BEEN MADE.

WHEREFORE, your deponent respectfully prays that the Court dismiss the indictment and grant such other and further relief as is deemed just and proper.

Albert R. Pincus

ALBERT R. PINCUS

Sworn to before me this
23 day of June, 1975.

Laura A. Russo

LAURA A. RUSSO
NOTARY PUBLIC, State of New York
No. 30-4516249
Qualified in Nassau County
Commission Expires March 30, 1976

8.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -X

UNITED STATES OF AMERICA,

-against-

STEPHEN LENT and DOMINICK SEMINARA,

Defendants.

- -X

AFFIDAVIT

Cr. No. 74CR 765

STATE OF NEW YORK)
) ss:
COUNTY OF NASSAU)

STEPHEN LENT, being duly sworn, deposes and says:

1. That he is the defendant in the above-entitled action and as such is fully familiar with the facts and circumstances in the within action and submits this affidavit in support ofthe instant motion for an order dismissing the indictment on the grounds that it is invidious discrimination and selective enforcement.

2. That your deponent was informed by his attorney that a communication was received from Harold J. Friedman, Assistant United States Attorney requesting certain information with regard to the business operations of Foto Factory, Ltd. as can be seen by the accompanying exhibits and affidavit of your deponent's attorney. This information was promptly furnished to the United States Attorney in affidavit form and subsequently further information which was requested by the United States attorney was also submitted without delay.

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3. That there was also made known to your deponent the fact that the United States Attorney might wish to have this defendant appear before the Grand Jury to testify with respect to the corporate operations.

4. There was also no refusal to this request on the part of your deponent or his attorney. The only request made by deponent's attorney was that the questions which might be asked at the Grand Jury be submitted prior to the appearance so that the information necessary could be gathered by your deponent if available to him or within his knowledge.

5. That as a matter of fact, your deponent was informed by his attorney that since he was now residing in Florida that the United States Government would pay for the cost of his flight here to appear before the Grand Jury as it would any other case of a witness residing out of state.

6. That your deponent wishes to state unequivocably that he has at all times been ready, willing and able as well as continually available to appear before the Grand Jury to give testimony as requested in the subpoenas served upon deponent's attorney. However, deponent was never in fact given the opportunity to appear before the Grand Jury and instead the Grand Jury indicted your deponent and the co-defendant, SEMINARA after taking testimony from the two other officers of the corporation.

7. That it seems to your deponent that the taking of the testimony from the other two officers of the corporation and not permitting

your deponent an opportunity to be heard was in fact invidious and discriminatory and deprived him of his right of equal protection under the laws and was, therefore, in violation of the protection guaranteed by the Constitution of the United States.

8. That it is interesting to note that the Grand Jury apparently indicted your deponent prior to receiving the information requested from your deponent in the subpoenas issued by the United States Attorney so that your deponent was in fact not given an opportunity to be heard in any manner either in person or by affidavit and the fact that the United States Attorney gave that opportunity prior to that indictment being issued to the remaining officers of the corporation deprived your deponent of his rights under the Constitution.

9. That in view of the discriminatory practice against your deponent on behalf of the United States Attorney's office and the Grand Jury which in and of itself is an arm of the prosecution, your deponent has in fact been denied equal protection of the law which protection was granted to the remaining officers who were in fact permitted to testify.

WHEREFORE, your deponent respectfully requests that the instant motion be granted in all respects and that the indictment now pending against your deponent be dismissed on all counts based upon the discrimination practiced upon him by the prosecution in this case and

for such other and further relief as to the court may seem just and proper.

Stephen Lent
STEPHEN LENT

Sworn to before me this
23 day of June, 1975.

Laura A. Russo

LAURA A. RUSSO
NOTARY PUBLIC, State of New York
No. 30-4516248
Qualified in Nassau County
Commission Expires March 30, 1976

Form No. 110 (Rev. 5-68) Subpoena to Testify Before Grand Jury

JWR:HJF:dc
F. 741,387

United States District Court
FOR THE

Eastern District of New York

To Stephen Lent
c/o Albert K. Pincus, Esq.
2950 Hempstead Turnpike
Levittown, New York 11756

You are hereby commanded to appear in the United States District Court for the Eastern District of New York at 225 Cadman Plaza East in the city of Brooklyn on the 22nd day of November 1974 at 11 o'clock A.M. to testify before the Grand Jury and bring with you[1] the items listed on Schedule A annexed hereto.

This subpoena is issued on application of the United States of America

Harold J. Friedman
Assistant U.S. Attorney
212-596-3012

LEWIS ORGEL
Clerk.

By ..... Deputy Clerk.

Date November 13, 1974

[1] Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose.

RETURN

Received this subpoena at ..... on .....
and on ..... at ..... I served it on the
within named .....
by delivering a copy to ..... and tendering* to ..... the fee for one day's attendance and the mileage
allowed by law.

Date ....., 19.....

By .....

Service Fees
Travel ..... $
Services .....
Total ..... $

* Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof. 28 USC 1825, or on behalf of a defendant who is financially unable to pay such costs (Rule 17(b), Federal Rules Criminal Procedure).

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Exhibit A

NOV 20 1974

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

HJF:dc
741,387

November 19, 1974

Albert K. Pincus, Esq.
2950 Hempstead Turnpike
Levittown, New York 11756

Re: Grand Jury Investigation
of Foto Factory Ltd.

Dear Mr. Pincus:

With reference to the subpoena that we mailed to you in which your client, Stephen Lent, is directed to appear before the Federal grand jury on November 22, 1974, we ask that you include the following items in Schedule A of the subpoena:

1. The names of all companies and individuals who furnished Foto Factory Ltd. with customer lists including but not limited to computer lists.

2. Any and all customer lists including but not limited to computer prints outs used by Foto Factory Ltd. between January 1, 1972 and November 15, 1973.

Very truly yours,

DAVID G. TRAGER
United States Attorney

By: Harold J. Friedman
Assistant U.S. Attorney

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EXHIBIT B

December 6, 1974

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, NEW YORK 11201

re: Grand Jury Investigation of Foto Factory, Ltd.
DGT:HJF:dc
F. 741,387

Att: Harold J. Friedman
Assistant U. S. Attorney

Dear Mr. Friedman:

Confirming our telephone conversations of December 5th and December 6th relative to the above, this will confirm the fact that my client Stephen Lent will exercise his constitutional right against self-incrimination and answer no questions before the Grand Jury other than the questions appearing in the original subpoena and your letter of November 19th which augmented same.

The answers to those questions are contained in the enclosed affidavit of Mr. Lent which is self-explanatory. I am sincerely sorry that we could not have been more help to you in this matter and I am certain that you realize that my actions were for the protection of my client.

This will also confirm the fact that my client's appearance was waived by your office in lieu of the enclosed affidavit.

Thank you for your cooperation.

Very truly yours,

ALBERT R. PINCUS

ARP:lr
Enc.

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Exhibit C

STATE OF NEW YORK)
COUNTY OF SUFFOLK) SS:

STEPHEN LENT, being duly sworn, deposes and says:

1. That your deponent is the person named in a certain subpoena dated November 13, 1974 issued by Harold J. Friedman, Assistant U. S. Attorney requesting deponent's appearance on November 22, 1974 before the Grand Jury at Cadman Plaza East to give testimony regarding the following items: (1) Any and all checks drawn on the account of Foto Factory, Ltd. at the Bank of Delaware, Wilmington, Delaware between December 1, 1973 and January 1, 1974. (2) Any and all bank statements on the account of Foto Factory, Ltd.., Bank of Delaware, Wilmington, Delaware between September 1, 1973 and January 1, 1974.

2. That this subpoena was later augmented by a letter of November 19, 1974 from Assistant U. S. Attorney, Harold J. Friedman, to Albert R. Pirrus, your deponent's attorney requesting: (1) the names of all companies and individuals who furnished Foto FActory, Ltd. with customer lists including but not limited to computer lists. (2) any and all customer lists including but not limited to computer print-outs issued by Foto Factory, Ltd. between January 1, 1972 and November 15, 1973.

3. That subsequently, the date of my appearance was adjourned to December 6, 1974.

4. That I am informed by my attorney taht Assistant U. S. Attorney, Harold J. Friedman informed my attorney that it would not be necessary for me to appear as I would give the answers to the above questions in this affidavit and refuse to answer any further questions other than those mentioned in the subpoena.

5. That accordingly the answers to the aforesaid questions are": Questions (1) and (2) - My only knowledge of the checks, bank statements and other records of the aforementioned corporation were that they were turned over to an attorney representing the creditors in the bankruptcy proceeding of the corporation. I have not seen the books and records since they were so turned over and do not recall the name of the attorney representing the creditors.

Exhibit D

6. That with respect to the two questions in the letter of November 19th I do not recall the names of the companies or individuals who furnished the corporation with customer lists or computer print-outs.

STEPHEN LENT

SWORN TO BEFORE ME THIS

DAY OF DECEMBER, 1974

NOTARY PUBLIC

FROST, ZAIAS AND ASSOCIATES, P.A.
DISEASES OF THE SKIN AND SKIN CANCER

PHILLIP FROST, M.D.
NARDO ZAIAS, M.D.
EDWARD C. GOMEZ, M.D., PH.D.
HAROLD B. HEISS, M.D.

SUITE 402, ABBEY BUILDING
960 ARTHUR GODFREY ROAD
MIAMI BEACH, FLORIDA 33140
TELEPHONE: (305) 674-2730

February 18, 1975

TO WHOM IT MAY CONCERN:

SUBJECT: Stephen Lent

This patient is currently under treatment for psoriasis. He is receiving mycophenolic acid, an investigational drug, as part of a two-year evaluation of this agent in the treatment of psoriasis. Participation in this investigational program requires close supervision with frequent visits for evaluation of therapeutic effects and adjustment of dosage. Should he continue to do well on this present therapeutic regimen it might be continued for as long as two years.

Sincerely,

Edward C. Gomez, M. D., Ph. D.

ECG/mm

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Exhibit E

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER
JWR:HJF:dc
F. #741387

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

596-4328

December 11, 1974

Mr. Albert R. Pincus, Esq.
2950 Hempstead Turnpike
Levittown, New York 11756

Re: U.S.A. v. Foto Factory Ltd.

Dear Mr. Pincus:

We are in receipt of your letter dated December 6, 1974, and Mr. Stephen Lent's affidavit of that date. If you examine Item 2 of the undersigned's letter to you dated November 19, 1974, you will note that it requires that Mr. Lent furnish any and all customer lists including but not limited to computer print-outs used by Foto Factory Ltd. between January 1, 1972 and November 15, 1973.

In Mr. Lent's affidavit he does not indicate that he is in possession of any of the materials listed in Item 2. Pursuant to our understanding, we ask that Mr. Lent include in his affidavit whether he is in possession of any of the materials listed and if so, that he produce these materials to this office.

Very truly yours,

DAVID G. TRAGER
United States Attorney

By: Harold J. Friedman
Assistant U.S. Attorney

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Exhibit E

December 23, 1974

United States Attorney
Eastern District of New York
Federal Building
Brooklyn, New York 11201

re: U.S.A. v. Foto Factory Ltd.
JWR:HJF:dc
F. #741387

Att: Harold J. Friedman
Assistant U. S. Attorney

Dear Mr. Friedman:

I am in receipt of your letter of December 11th and have noted the contents thereof.

Refering to Mr. Lent's affidavit, paragraph 6 thereof states that with respect to the questions contained in your letter of November 19th, that he does not recall the names of the companies or individuals who furnished the corporation with customer lists or computer print-outs.

Mr. Lent also informs me that he is not now in possession of any of these customer lists or computer print-outs and does not know of their whereabouts.

If you would require an additional affidavit to that effect, I will be pleased to furnish same for you, however, both Mr. Lent and I felt that that information was indicated in paragraph 6 of his affidavit.

In the meantime, I should also like to take this opportunity to ask that you supply this office with any statements made to any governmental agency by Mr. Lent including statements made to any federal governmental agency and Nassau County District Attorney's office as well.

Thank you for your continued cooperation in this matter.

Very truly yours,

ALBERT R. PINCUS

ARP:lr

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Exhibit G

Bartels, J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CR 765

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

STEPHEN LENT and
DOMINICK SEMINARA,

Defendants.

Cr. No. _____
(T. 18 U.S.C. §1341 and §2)

December 9, 1974

- - - - - - - - - - - - - - - - - - X

THE GRAND JURY CHARGES:

COUNTS ONE THROUGH FIFTY

1. During all times material herein, Foto Factory Ltd. was a corporation duly organized and existing under the laws of the State of Delaware and was engaged in the business of processing or developing photographic film at 240 Maple Avenue, Rockville Centre, New York.

2. During all times material herein, the defendant Stephen Lent, did serve as President and was a director and stockholder of Foto Factory Ltd.

3. During all times material herein, the defendant Dominick Seminara, did serve as Treasurer and was a director and stockholder of Foto Factory Ltd.

4. On or about and between September 15, 1973, and October 30, 1973, within the Eastern District of New York, the defendants Dominick Seminara and Stephen Lent did unlawfully, wilfully and knowingly devise and intend to devise a scheme and artifice to defraud approximately 12,000 BankAmericard and MasterCharge credit card holders throughout the United States, as well as the Chase Manhattan Bank N.A., the National Bank of North America and the First National City Bank, and to obtain approximately $120,000 from said banks by means

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Eastern H

of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be and were false and fraudulent when made.

5. It was part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently cause to be prepared and sent through the mail, envelopes for film processing (designated "Prepaid Processing Mailer") to persons whom they knew to be BankAmericard and MasterCharge credit card holders without any prior knowledge or consent of the credit card holders.

6. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently cause to be prepared and included with the "Prepaid Processing Mailer[s]", a written statement setting forth the following representation:

MONEY BACK GUARANTEE

Enclosed is your assortment of prepaid Foto Factory mailers. One for 12 exposure color film, 2 for 20 exposure color film and one for 20 exposure slide film or Super 8 movie film.

When you are ready to develop your film, simply fill out name and address and enclose film - SEND NO MONEY - these are prepaid mailers.

We are certain you will enjoy dealing direct with the Foto Factory. Be sure not to lose or destroy these mailers. They are worth $22.10.

7. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently omit and conceal from the written statement, quoted in paragraph 6, the fact that each account of the credit card holders was being simultaneously charged $9.95 with the mailing of each of the "Prepaid Processing Mailer[s]".

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8. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent

did knowingly and fraudulently cause credit card sale slips, each in the sum of $9.95, to be prepared, deposited and credited to the bank accounts of Foto Factory Ltd. maintained at Chase Manhattan Bank N.A., National Bank of North America and First National City Bank.

9. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently cause the withdrawal of all but a nominal sum of monies from the aforesaid bank accounts of Foto Factory Ltd., on a daily basis.

10. It was a further part of the scheme and artifice to defraud that the defendants Dominick Seminara and Stephen Lent did knowingly and fraudulently give instructions to be given, a false and misleading explanation to credit card holders who inquired about the reason their accounts had been charged $9.95, in that the credit card holders were told that their accounts had been mistakenly charged as the result of a "computer error".

11. On or about the dates hereinafter set forth, within the Eastern District of New York, the defendants Dominick Seminara and Stephen Lent, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, did unlawfully, wilfully and knowingly place and cause to be placed in post offices and authorized depositories for mail matter, the aforesaid "Data Processing Mailer[s]" and accompanying written statements to be sent and delivered by the United States Postal Service in violation of Title 18, United States Code, Sections 1341 and 2, as hereinafter set forth in Counts One through Two.

COUNT	DATE	ADDRESSEE
1	September 21, 1973	David Sandler 24 Academy Circle Oakland, N.J. 07436

S6

COUNT	DATE	ADDRESSEE
2	September 28, 1973	Lawrence H. Tomlinson 20801 Olympian Way Olympia Fields, Ill. 60861
3	September 30, 1973	Edward R. Dearnley 23131 Port St. Clair Shores, Mich. 48082
4	September 30, 1973	James E. Esposito The English Village Bldg. 4 Apt. A5 North Wales, Pa. 19454
5	September 30, 1973	Ann Marie Redente 90 Colchester Dr. Plymouth, Mass. 02063
6	October 1, 1973	Leon Goodman 75 Lenox Road E.4 Brooklyn, New York 11226
7	October 1, 1973	E. M. Robertson Newton, Pa. 18940
8	October 2, 1973	Mrs. Arthur G. Cohler 1874 Barone Rd. Palm Springs, Calif. 92262
9	October 2, 1973	Seymour Johnson, Jr. 1216 Princeton St. Tacoma, Wash. 98466
10	October 2, 1973	Cary Vosburg Box 469 Ticonderoga, N.Y. 12883
11	October 4, 1973	Julius Pines 7E Crescent Rd. Greenbelt, Md. 20770
12	October 5, 1973	Wendel B. Boggs 694 N. King St. Xenia, Ohio 45385
13	October 5, 1973	Leslie J. Kriss 35 Jerome Avenue Hicksville, N.Y. 11801
14	October 5, 1974	H. Metzger 2595 Standford Boulder, Colo. 80302
15	Ocotber 5, 1973	Joseph Stevenson 3522 Kentucky Avenue Baltimore, Maryland 21213
16	October 9, 1973	M[illegible]in C. Chaiken 8[illegible]ean House Road C[illegible] Elizabeth, Maine 09002
17	October 9, 1973	H[illegible]n Ch l[illegible] G. Ro[illegible] Mayberry S[illegible]a Ana, Calif. 92701
18	October 9, 197	Robert P[illegible]n 503 E. J[illegible]n St.

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COUNT	DATE	ADDRESSEE
19	October 10, 1973	Clayton Green c/o Carolyn Green R.F.D. West Kingston Rhode Island, 02892
20	October 10, 1973	Charles Lazare 439 Nancy Dr. Baton Rouge, La. 70815
21	October 11, 1973	S. D. Kletzien 299 Branch Brook Dr. Belleville, N.J. 07109
22	October 11, 1973	Bernard Tepper 299 Bennett Ave., Apt. 3C New York, N.Y. 10040
23	October 11, 1973	Donald Tom 181 Waverly Place - 1 New York, N.Y. 10014
24	October 12, 1973	J.L. Fry 3178 Wendover Dr. Toledo, Ohio 43606
25	October 12, 1973	Sam Warsoff 19 Mirror Lake Rd. Spring Valley, N.Y. 10977
26	October 15, 1973	Andrew Balducci 36 Glen Brook Dr. Prospect Hgts, Ill. 60070
27	October 16, 1973	Ralph Kraft Box 63 Jamestown, N.D. 58401
28	October 16, 1973	Clarence Lewis 6631 W. 83rd St. Los Angeles, Calif. 90045
29	October 17, 1973	Henry Adams 789 Clifton Road Bethel Park, Pa. 15102
30	October 17, 1973	Herbert L. Corey 11 Amherst Drive Massapequa, N.Y. 11758
31	October 17, 1973	Peter Parafin 24534 Greenbrier E. Detroit, Mich. 48021
32	October 18, 1973	M. G. Dalgleish 2600 Pine View Dr. Fortuna, Calif. 95540
33	October 18, 1973	Wm. Lemley 4426 N.E. 17th St. Renton, Wash. 98055
34	October 18, 1973	Anthony K. Obst 1260 Crim Road Somerville, N.J. 08876

COUNT	DATE	ADDRESSEE
36	October 18, 1973	Charles Sheehan 287 High Street Middletown, Conn. 06457
37	October 19, 1973	Nora Hackett 45 Elm St. 4B Quincy, Ma. 02169
38	October 19, 1973	Jules N. Stern 2182 Batchelder St. Brooklyn, N.Y. 11229
39	October 19, 1973	R. J. Stewart P.O. Box 185 Long Beach Br. Beach Haven, N.J. 08008
40	October 19, 1973	J.B. Thurman 2024 So. 18 St. New Castle, Ind. 47362
41	October 19, 1973	S. Vanov 3790 Stoughton Rd. Collegeville, Pa. 19426
42	October 19, 1973	J. Vestal 3519 Cornell Pl. Cincinnati, Ohio 45220
43	October 22, 1973	Frances Goller 54-40 Little Neck Pkwy. Little Neck, N.Y. 11362
44	October 23, 1973	Juit M. Divet P.O. Box 1039 Tacoma, Wash. 98401
45	October 24, 1973	Fred L. Grant 4615 Hunt Rd. Cincinnati, Ohio
46	October 24, 1973	W. Brad Schlegel 821 S. Broad St. Lansdale, Pa. 19446
47	October 25, 1973	Wendell B. Boggs 694 N. King St. Xenia, Ohio 45385
48	October 25, 1973	Wm. J. Brodsley 1820 Redondela Dr. San Pedro, Calif. 90732
49	October 25, 1973	Bruce J. Miller 13 Doe Lane Malverne, Pa. 19355
50	October 25, 1973	John Reeves 3264 Clifton Ct. Palo Alto, Calif. 94303

A TRUE BILL.

99

s/ [illegible]

FOREMAN.

Indictment

~~Indictment~~ No. CR 765 Year 19 74

UNITED STATES OF AMERICA

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

STEPHEN LENT and DOMINICK SEMINARA,

Defendants

June 24, 1974
10:00 AM

MOTION TO DISMISS INDICTMENT
and supporting AFFIDAVIT

ALBERT R. PINCUS
Attorney for Defendant STEPHEN LENT

2950 HEMPSTEAD TURNPIKE
LEVITTOWN, NEW YORK 11756
(516) 731-4141

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

.....

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on* *19*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on* *19* *, at* *M.*

Dated:

ALBERT R. PINCUS

Attorney for

2950 HEMPSTEAD TURNPIKE
LEVITTOWN, NEW YORK 11756

To:

15

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORDER OF SUSTENANCE
~~AND/ OR LODGING~~

- - - - - - - - - - - - - - -

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
JUL 1 1975
TIME A.M.
P.M.

U.S.A

Plaintiff

74 CR 165
File Number

- VS -

STEPHEN LENT
DOMINICK SEMINARA
Defendant(s)

- - - - - - - - - - - - - - - - -X

~~lodging~~

ORDERED that the Marshal supply proper sustenance to the (14) jurors empaneled in the above entitled case, and to the (—) U. S. Deputy Marshals in attendance thereon.

DATED: Brooklyn, New York

JUNE 30, 1975

COFFEE
12 JURORS
2 ALTERNATES
(U.S.D.C.H. CONFESSION
STEPHEN CHARNEZKY)
$2.80

J. R. Bartels
U. S. D. J.

(NOTE: Strike the inapplicable word.)

100

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORDER OF SUSTENANCE
[redacted]

- - - - - - - - - - - - - - - - X

U.S.A.

Plaintiff

- VS -

STEPHEN LENT
DOMINICK SEMINARA
Defendant(s)

FILED
U.S. DISTRICT COURT
JUL 11 1975
TIME A.M.
P.M.

74 CR 765
File Number

- - - - - - - - - - - - - - - - -X

[redacted]

ORDERED that the Marshal supply proper sustenance to the (14) jurors empaneled in the above entitled case, and to the (2) U. S. Deputy Marshals in attendance thereon.

DATED: Brooklyn, New York

July 11, 1975

Lunch

U.S.D.J.

U . S . D . J .

(NOTE: Strike the inapplicable word.)

16

M'FILMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORDER OF SUSTENANCE
~~AND/ OR LODGING~~

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
JUL 14 1975
TIME A.M.
P.M.

- - - - - - - - - - - - - - -X

U.S.A.

Plaintiff

- VS -

STEPHEN LENT
DOMINICK SEMINARA

Defendant(s)

74 CR 16

File Number

- - - - - - - - - - - - - - - -X

~~lodging~~

ORDERED that the Marshal supply proper sustenance to the (14) jurors empaneled in the above entitled case, and to the (7) U. S. Deputy Marshals in attendance thereon.

DATED: Brooklyn, New York

July 14, 1975

Lunch

R Bartels

U. S. D. J.

(NOTE: Strike the inapplicable word.)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ORDER OF SUSTENANCE
~~AND/ OR LODGING~~

- - - - - - - - - - - - - - - - X

U.S.A. Plaintiff

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
JUL 1 = 1975
TIME A.M.....
P.M.....

74CR765
File Number

- VS -

STEPHEN LENT
DOMINICK SEMINARA
Defendant(s)

- - - - - - - - - - - - - - - - X

ORDERED that the Marshal supply proper ~~lodging~~ sustenance to the (12) jurors empaneled in the above entitled case, and to the (2) U. S. Deputy Marshals in attendance thereon.

DATED: Brooklyn, New York

July 14, 1975

COFFEE

/s/ John R. Bartels

U. S. D. J.

(NOTE: Strike the inapplicable word.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
JUL 21 1975
TIME A.M.
P.M.

UNITED STATES OF AMERICA

-against-

STEPHEN LENT AND DOMINICK SEMINARA,

Defendants.

MEMORANDUM OF LAW

ON THE BEHALF OF THE DEFENDANT, STEPHEN LENT

ALBERT R. PINCUS
2950 Hempstead Turnpike
Levittown, New York 11756
Attorney for Defendant
516-731-4141

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
-against-	MEMORANDUM OF LAW
STEPHEN LENT AND DOMINICK SEMINARA, Defendants.	

THE FACTS

Defendant is charged with mail fraud in violation of 18 United States Code Sections 1341 and 1342. The indictment alleges that the defendant devised and carried out a scheme to defraud credit card holders by sending to them prepaid processing mailers and charging them $9.95 simultaneously with the mailings without the knowledge or consent of the credit card holders.

THE LAW

1. It has been held that in a prosecution in violation of the mail fraud statutes that the government must show some actual injury or harm was contemplated by the schemer. United States v. Regent Office Supply Co., 421 F2d 1174 (2nd Cir. 1970)

2. Numerous federal courts have held that intent to defraud is an essential element of mail fraud and that the burden is upon the government to prove it existed. United

States v Sparrow, 470 F2d 885, (10th Cir. 1972) Cert. denied 411 US 936, 93 S.Ct. 1913, 36 L. Ed2d 397.

3. Good faith is complete defense to mail fraud, New England Enterprises Inc. v United States, 400 F2d 58 (1st Cir. 1968)

4. Fourth Amendment guarantees extend to protecting the mails from unreasonable search and seizure, Ex Parte Jackson, 96 US 727 (1878).

POINT I

DEFENDANT HAS NOT VIOLATED THE MAIL FRAUD STATUTES AS NO ACTUAL HARM OR INJURY WAS CONTEMPLATED ON HIS BEHALF

In any prosecution for violation of the mail fraud statutes the Government must show that some actual injury or harm was contemplated by the schemer. It is not enough merely to show an intent to deceive, United States v Regent Office Supply Co., 421 F2d 1174 (2nd Cir. 1970). The purpose of the scheme must be to injure. Horman v United States, 116 F350 (6th Cir. 1902).

In the case of United States v Regent Office Supply Co., the defendants while being prosecuted for violating 18USCA1341 went so far as to offer a stipulation showing that false representations were made and that they were made by defendants' agents with knowledge of their falsehood. The con-

sequence of the transaction of which the untrue statements were an incidental part thereof was the transfer of money and property. In dealing with the stipulation the court said:

> "an intent to deceive, and even to induce, may have been shown; but this does not without more constitute the "fraudulent intent" required by the statute." United States v Regent Office Supply Co., supra, at 1181.

It is clear that in the present case there could not have been any harm contemplated for the value of the processed mailers was substantially more than $9.95. As pointed out in United States v Regent Office Supply Co., supra, at 1181:

> "If there is no proof that the defendants expected to get "something for nothing," Harrison v United States, 200F662 (6th Cir. 1912) or that they intended to get more for their merchandise than it was worth to the average customer, it is difficult to see any intent to injure or to defraud in the defendant's falsehood."

There is no question that the defendant was transferring to every customer valuable mailers for which the consideration received by the defendant could not be called anything but reasonable.

POINT II

GOVERNMENT HAS NOT PROVED DEFENDANT, STEPHEN LENT HAD INTENT TO DEFRAUD AS REQUIRED IN VIOLATIONS OF 18USC1341

As is noted in numerous cases it is the burden of

the government in mail fraud violations to prove that the defendant had an intent to defraud. Intent to defraud is an essential element of mail fraud, United States v Sparrow 470 F2d 885 (10th Cir. 1972) cert Denied 411 US 936, 93SCt 1913,36 Led2d397 (1972); United States v Jones, 425F2d 1048 (9th Cir. 1970) cert. denied 91 S. Ct44, 400 US 823.27 L.Fd2d 51; United States v Shipp, 359 F2d185 (6th Cir. 1966) Cert. denied 385US903.87 S.Ct 213.17 LE2d 134 (1966); United States v. Kyle 257 F2d 559 (2nd Cir. 1958); United States v Gassomier, 7 F.R.D. 712 (D.C. Del. 1943).

As was held in United States v Reese, 96F.Supp 913 (D.C. Pa. 1951),

> "Under the mail fraud statute, defendant need not have profited from his scheme in order to here violated the law, but he must have intended to deprive his alleged victims of something of value."

The defendant, Stephen Lent, herein did at no time have such an intent to defraud and the government has been unable to prove one. The introductory offer ($9.95 mailer) upon which the violation is based was one of which the government alleges consisted of a mailing to 50 customers who had previously purchased from the company. The introductory offer consisted of four prepaid photo envelopes with a value of $22.10 but sold at $9.95. The company's officers were at all times willing to service their customers. In fact all

were refunded by the company if the merchandise was not wanted or subsequently developed.

The only real problem arose wherein the postal authorities seized certain sacks of mail and returned the mailers to the customers even though the company officers agreed to process the film.

What we conclude with therefore is that there was no intent to defraud at all, only a dissatisfied consumer left with undeveloped film because of the interference of governmental authorities. At all times the defendant herein and others were ready, willing, and able to remedy this unfortunate incident which if anything, was only a poor business judgment and nothing more. The defendants at all times pursued a policy which included refunds to customers who did not request the merchandise or who were dissatisfied with it. As it was held in State v Harris, 313SW2d 664.670 (Sup. Ct. Mo. 1958):

> "An intent to defraud indicates a purpose or design to deprive someone of lawful right, interest, or property by fraudulent means and is in consistent with an intent to return property to its owner."

Additionally, it was held in Harrison v United States, 200F662.670 (6th Cir. 1912) where literature cited

that refunds would be given if customers were dissatisfied with purchased vacuum cleaners that:

> "The promise to refund the purchaser's money if made in good faith and taken in connection with the literature here used could leave no room for the conclusion that the scheme upon the whole was one of defraud."

POINT III
DEFENDANT WAS NO PART OF SCHEME OR ARTIFICE TO DEFRAUD BUT ACTED IN COMPLETE GOOD FAITH

In United States v Corlin, 44 FSupp 940 (D.C. Cal 1942) it was held that:

> "A scheme or artifice to defraud meant to form some plan or devise some trick to perpetrate a fraud upon another".

In this case, the defendant, Stephen Lent, not only did not devise such actions but the good faith of the defendant in the plan or transactions involved herein constitute a complete defense which he may assert under 18USC1341. This doctrine, that good faith is a complete defense to mail fraud, is long standing and widely recognized, New England Enterprises Inc. v United States, 400F2d 58 (1st Cir. 1968); Steiger v United States, 373 F2d 133 (10th Cir. 1967); Sparrow v United States, 402 F2d 826 (10th Cir. 1968); United States v Diamond, 430F2d 698 (5th Cir. 1970); Hoffman v United States, 353 F2d 188 (10th Cir. 1965); Coleman v United States, 167F2d 837 (5th Cir. 1948).

As stated in Point II, had it not been for the unlawful search and seizure of the mail by postal authorities, all the prospective consumers would have been satisfied and hence the defendant was at all times acting in the utmost good faith by working at his best to reconcile the above business problems.

POINT IV

AS A RESULT OF THE UNLAWFUL SEARCH AND SEIZURE OF DEFENDANT'S MAIL THERE CAN BE NO CONVICTION FOR ANY VIOLATION UNDER THE MAIL FRAUD STATUTE

The protection against unreasonable search and seizure of one's papers or other effects guaranteed by the Fourth Amendment extends to their presence in the mails. As pointed out in Ex Parte Jackson, 96 US727,733 (1878):

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the Fourth Amendment of the Constitution."

Thus, first-class mail cannot be seized and retained, nor opened and searched without the authority of a search warrant. It has been stated by one court:

> "that heavy public reliance on the mail requires its security until actual receipt by the addressee. One mailing a first-class letter should expect and be assured that the letter will be safe from unreasonable searches and seizures." State v Stubka, 461 P2d (Ct of App. Ariz. 1969).

But the Supreme Court in a more recent opinion, United States v Van Leeuwen, 397 U.S. 249 (1969) asserted that first class mail is not beyond the reach of all inspecting and is subject to detention when the situation warrants it. In the Van Leeuwen case the defendant mailed two 12 pound packages of gold coins at Mt. Vernon, Washington, near the Canadian border, to addresses in California and Tennessee under circumstances arousing suspicion such as the fact that the return address on the packages was a vacant housing area of a nearby junior college. It should be noted that the atmosphere in Van Leeuwen was akin to a customs search and that where customs is involved there must of necessity be more delay than in the ordinary transmission of the mails. See United States v Sadrzdeh, 440F2d 389 (9th Cir. 1971). The Supreme Court held that the detention of the mail for a period of 29 hours in order to obtain the search warrant needed for its inspection was not "unreasonable" within the meaning of the Fourth Amendment.

But as pointed out in United States v. Outland, 345F. Supp. 1250 (1972) detention of mail at some point could become an unreasonable seizure of "papers" or "effects" under the Fourth Amendment. United States v Outland involved a prosecution for importation and possession of marijuana. The two packages in question were taken from the ordinary course of mail by an employee of the International Mail Division for purposes of a test to determine the contents of the packages. The government held the packages for 85 days after discovery of the alleged marijuana, then requested two search warrants and delivered the packages to the addresses prior to executing the warrants. The court held that under Van Leeuwen a lapse of 85 days of the facts of the instant case would have been held unreasonable. The court went on to say that "what occurred was an example of official lawlessness which cannot be tolerated in a civilized society."

It should be noted that in the Outland case the defendant asserted that the governmental authorities violated two federal criminal statutes: 18 USC Statute 1702, which forbids the obstruction of correspondence and 18 USC Section 1703, which forbids postal employees from improperly delaying opening, or destroying mail. The court said that although it is possible, on the facts presented, that the authorities violated the statutes, the search and seizure procedure followed was so defective that the Government would not prevail even if it were found not to have violated the above...

cited statutes.

In the present lawsuit not only do we not have the suspicous circumstances that are a requisite for the detention of first-class mail, but there is also the fact that no warrant was ever obtained to justify the search and seizure of the mailers in question. The use of the mails is not a privilege but a right which cannot be denied without due process of law as guaranteed by the Fifth Amendment. And to seize the mail restrains communication before it has been found fraudulent. Until such a determination the communication should fall within the ambit of the First Amendment. Mr. Justic Holmes in Milwaukee Pub. Co. v Burleson, 225 US 407, 437 (dissenting opinion), said that "the use of the mails is almost as much a part of free speech as the right to use our tongues." Thus a seizure without a warrant may be regarded as a prior restraint on freedom of speech.

Earlier legislation permitting summary impounding of allegedly obscene materials did not authorize summary impounding of allegedly fraudulent materials. Act of July 27, 1956, Ch. 755, Sections 1, 70 Stat. 699. Bills which would have permitted summary impounding of fraudulent as well as obscene material failed of passage in the 82nd Congress, 1st session (H.R. 174). Instead Congress enacted 39 USCA Section 4007 (now Section 3007) which stripped the Postmaster General of his power to issue interim order for any period and directed him to seek such an order in a federal district

court. 39 USCA Section 3007 authorizes the district court upon a showing of probable cause to believe Section 3005 (false representations) and Section 3006 (unlawful matter) are being violated to enter a temporary restraining order directing the detention of defendant's incoming mail pending conclusion of administrative proceedings under 39 USCA 3005, 3006. While it is submitted that these sections involve administrative proceedings and not criminal actions it is unlikely that Congress would have required a temporary restraining order to be conditioned on a showing of probable cause, but at the same time would have intended that the detention of mail permanently in the criminal law suit could be issued without any hearing at all. Furthermore, the validity of Section 3007 is doubtful since the provision on which it is based was held violative of the First Amendment because it lacked adequate procedural safeguards. See Blount v Rizzi, 400U.S. 410.(1971).

The seizure of the mail was not necessary for the effective policing of the mails. While the seizure of the mail might prevent the fly by night operator from absconding with his profits it deals just as harshly with the innocent businessman who is only seeking to complete a lawful transaction in good faith. And since one's conduct may give rise to punishment under 18 USCA Section 1341 and Section 1342 the postal authorities can obtain the arrest and detention of the accused to prevent flight before trial.

CONCLUSION

The federal indictment is directed at preserving the integrity of the United States mails. It is ironic that this is the avowed purpose of the mail fraud statutes and that the mail was illegally seized and searched. Adequate provisions existing for delaying delivery until the attainment of a search warrant, the search of the mailers must be deemed illegal and hence any conviction improper. See People v Moraitis, 63 Misc. 2d 344 (Suffolk County Court 1970).

Moreover there was no actual harm or injury contemplated by the defendant and any conviction would be improper under the pertinent statutes.

Additionally because there was no intent to defraud and since defendant at all times acted in good faith there could be no violation of the mail fraud statute. Hence, defendant, Stephen Lent is not guilty of violating Section 1341 and 1342 of Title 18 of the United States Code.

Respectfully submitted,

ALBERT R. PINCUS
Attorney for Defendant,
Stephen Lent
2950 Hempstead Turnpike
Levittown, New York 11756
516-731-4141

B4-20

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X
UNITED STATES OF AMERICA,

vs.

~~Civil~~ Action No.
74 CR 765

STEPHEN LENT & DOMINIC SEMINARA,

Defendants,
----------X

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANTS MOTION TO
DISMISS ORAL

----------X

Submitted By:

ROBERT RIVERS
Attorney for Defendant
Office & P.O. Address
287 Post Avenue
Westbury, New York 11590

TO: U. S. Attorney
225 Cadman Plaza
Brooklyn, New York

STATEMENT OF FACTS

The Federal Grand Jury of Kings County on the 9th day of December, 1974 indicted the above-named defendants under Title 18 U.S.C. 1341 and 2. The said indictment stems from the operation and organization of Foto Factory Ltd. by the defendants.

The basis of the indictment is that on or about and between September 15, 1973, and October 30, 1973, the defendants devised a scheme to defraud a certain credit cardholder and in furtherance of the scheme defendants fraudulently caused to be prepared and sent through the mail, envelopes for film processing to certain credit cardholders without disclosing that each account of the credit cardholders was being simultaneously charged $9.95 with the mailing of each of the "prepaid processing mailers."

It is the contention of the defendants that their conduct does not constitute the crime charged and further that the defense of "good faith" has been established as a matter of law.

It is alleged that on or about and between September 15, 1973, and October 30, 1973, the defendants' knowingly devised and intended to devise a scheme and artifice to defraud certain persons by means of false and fraudulent pretenses, knowing ' at the time that the pretenses and promises were false and fraudulent when made, and that as part of this scheme to defraud their customers, the defendants' caused to be sent through the mails certain "Prepaid Film Mailers" to former credit card customers.

The prosecution has failed to show an intent to defraud existing in the minds of the defendants'. The memorandum sent out with the $9.95 offer specifically indicates that the mailers were of value and that the customer's money would be refunded. There was no representation that the service would be free of charge. Although the wisdom of the promotion is questionable, this fact does not per se render the defendants guilty of mail fraud. As was said by the Court in the case of Steiger v. U.S., 373 F, 2d 133 (10th Cir.)

> "The fact that the scheme, viewed in retrospect, would be regarded as impractical and visionary by reasonable persons of ordinary judgment and prudence does not defeat a defense of good faith,

> if the defendant asserting such defense actually believed that the plan was practical and would succeed."

The prosecution has attempted to fathom the intent of the defendants by calling and examining former employees of Foto Factory Ltd., however, a review of their testimony shows that on cross examination, each one admitted that it was the policy of Foto Factory Ltd. to honor the money back guarantee and to otherwise satisfy any customer who had a complaint. This testimony, elicited from the prosecutor's own witnesses, establishes with clarity the good faith of the defendants and the truthfulness of their representations. The significance of this testimony becomes evident when one considers that "good faith" has been held to be a complete defense to a mail fraud prosecution. BECK v. U.S., 305 F 2d 595; DURLAND v. U.S., 161 U.S. 306, 16 S. Ct. 508, 40 L. Ed. 709; FRANK v. U.S., 220 F. 2d 599; HAWLEY v. U.S., 133 F 2d 966; GOLD v. U.S. 36 F 2d 16; COLEMAN v. U.S., 167 F 2d 837.

In the case of WHITEHEAD v. U.S., 245 F 385, 396, the Court said:

> "***More than 100 witnesses were introduced, each of whom testified that the agent had, by statements, led him to believe that he would, at the end of six months be able to secure a loan

of $1,000.00 from the company at 5 per cent interest."

The proof presented in the case at bar is greatly inferior to the quantity and content of the proof in the Whitehead case. In the case at bar, fewer than a dozen "consumers" testified, and their tales were generally not even inculpatory, not being out of pocket or induced by any false representation to lose any money.

The Court in the case of SPARROW v. U.S., 402 F 2d 826, said that,

> "It is apparent that this defense and the statutory intention which is an essential element of the offense are both related to defendant's objectives and purposes."

In the case at bar, what are the objectives and purposes of the defendants? Merely to market a successful product by guaranteeing the customer's satisfaction or else providing refunds. In this regard, the Court's attention is referred to the letter from Foto Factory Ltd. to its customers, which letter was put in evidence by Mr. Friedman and read as follows:

> "Dear Customer:
> Recently you may have received a "special introductory offer" of pre-paid film-processing envelopes valued at $22.10, which would cost you $9.95.

> We have discovered an error in our computer printout since mailing the offer to you. As a result of that error, the offer was incorrectly mailed to some customers who had not requested it, and charges were processed to their Master Charge or BankAmericard accounts. If you were unable to use these items, we would appreciate the return of the merchandise. Upon receipt of this merchandise and if your account was among those inadvertently charged we will issue a credit to your account. However, if you are waiting for a film order or processed pictures, please specify at the bottom of this letter. Please list below your name, address and credit card account number in the space provided below. A self addressed envelope is enclosed for your convenience. Very truly yours, Foto Factory."

Furthermore, there are marked in evidence, newspaper advertisements clearly defining the $9.95 offer. It cannot be asserted with accuracy that the defendants intended anything other than to provide their professional services to all those who received the four film mailers. It may have been ignorant or wishful thinking which caused the defendants to fail to perceive that some consumers would object to the mode of billing, but we submit that the defendants gave every effort to satisfy each customer, thereby exhibiting good faith.

CONCLUSION

Upon the foregoing facts, defendants respectfully request an order dismissing the within indictment on the ground that the prosecutor has failed to prove a prima facie case against the defendants and that the defense of "good faith" has been raised and not rebutted as a matter of law.

United States of America vs. 24 **United States District Court** for

DEFENDANT: STEPHEN LENT

M'FILMED

DOCKET NO.: 74 CR 765

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (b) (7/4)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH 9 DAY 19 YEAR 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Albert R. Pincus, Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FILED

SEP 19 1975

FINDING & JUDGMENT

There being a finding/verdict of { [ ] NOT GUILTY. Defendant is discharged / [XX] GUILTY. (counts 1 to 50 incl.) } TIME A.M. ..... P.M. .....

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.Code, Secs. 1341 & 2, in that from on or about Sept. 21, 1973 and Oct. 25, 1973, the defendant, with another, did unlawfully, wilfully & knowingly devise and intend to devise a shheme and artifice to defraud approximately 12,000 Bank Americard & Master Charge credit card holders throughout the U.S. as well as the Chase Manhattan Bank N.A., the National Bank of North America and the First National City Bank, and to obtain approximately $120,000 from said banks by means of false and fraudulent pretenses, representations and promises.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

On his conviction of guilty to counts 1 through 50 of the Indictment a sentence of three (3) years is imposed on each of counts 1 through 45 and pursuant to T-18, U.S.C.Sec. 3651, defendant shall be confined for a period of five (5)months, execution of remainder of the sentence is suspended and the defendant is placed on probation for a period of two (2) years and seven (7) months to commence at the end of the prison term. The sentences are to run concurrently for a period of five(5) months imprisonment and two (2) years and seven (7) months probation, but consecutively to defendant's present State sentence. Also imposed on each of counts 46 through 50 is a fine of $500 totalling $2,500. Execution of sentence is stayed pending appeal.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

**The court recommends incarceration at either Lexington, Kentucky or the Metropolitan Correctional Center.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

John R Bartels

Date 9/19/75

United States of America vs. 24 **United States District Court** for

DEFENDANT

M'FILMED

DOMINICK SEMINARA

DOCKET NO. 74 CR 765

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH 9 DAY 19 YEAR 1975

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL Robert Rivers, Esq. (Name of counsel)

FILED IN CLERK'S OFFICE U.S. DIST. COURT E.D. N.Y. SEP 19 1975

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY. counts 1 to 50 incl.

TIME A.M. P.M.

Defendant has been convicted as charged of the offense(s) of violating T-18, U.S.C.Secs.1341 & 2, in that from on or about Sept. 21, 1973 and Oct. 25, 1973, the defendant with another, did unlawfully, wilfully & knowingly devise a scheme and artifice to defraud approximately 12,000 Bank Americard and Master Charge credit card holders throughout the U.S. as well as the Chase Manhattan Bank, N.A., the National Bank of North America and the First National City Bank and to obtain approximately $120,000 from said banks by means of false and fraudulent pretenses, representations and promises

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

On his conviction of guilty to counts 1 to 50 incl., of the Indictment, a sentence of three(3) years is imposed on each of counts 1 through 45 and pursuant to T-18, U.S.C. Sec. 3651, defendant shall be confined for a period of five(5) months, execution of the remainder of the sentence is suspended and the defendant is placed on probation for a period of two (2) years and seven (7) months to commence at the end of the prison term. The sentences are to run concurrently for a period of five(5) months imprisonment and two(2) years and seven (7) months probation, but consecutively to defendant's present State sentence. Also imposed on each of counts 46 through 50 is a fine of $5000.00 totalling $2,500.00. Execution of sentence is stayed pending appeal.

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ADDITIONAL CONDITIONS OF PROBATION

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COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

*** The Court recommends incarceration at either Lexington, Kentucky or the Metropolitan Correctional Center.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge John R. Bartels

[ ] U.S. Magistrate

Date 9/19/75

25

UNITED STATES DISTRICT COURT FILED

EASTERN DISTRICT

SEP 19 12 37 PM '75

Docket Number 74 CR 765

U.S. DISTRICT COURT
EASTERN DISTRICT

HON. JOHN R. BARTELS
(District Court Judge)

25 FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ SEP 18 1975 ★

UNITED STATES v. DOMINICK SEMINARA & STEPHEN LENT

NOTICE OF APPEAL

Notice is hereby given that DOMINICK SEMINARA appeals to the United States Court of Appeals for the Second Circuit from the X Judgment ___ order TIME A.M. ..... P.M. ..... other ..... (specify) _____ entered in this action on September 19, 1975.
(Date)

(Counsel for Appellant)

Address ROBERT RIVERS, ESQ.
287 Post Avenue
Westbury, NY 11590

Date September 19, 1975

To:
DAVID TRAGER, U.S. ATTORNEY
225 Cadman Plaza
Brooklyn, New York

Phone Number (516) 333-3555

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY) TRANSCRIPT INFORMATION – FORM B

▶ QUESTIONNAIRE	▶ TRANSCRIPT ORDER	▶ DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATE).
X I am ordering a transcript ___ I am not ordering a transcript Reason: ___ Daily copy is available ___ U.S. Attorney has placed order ___ Other. Attach explanation	Prepare transcript of ___ Pre-trial proceedings ___ Trial X Sentence September 19, 1975 ___ Post-trial proceedings	

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ▶ Method of payment X Funds ___ CJA Form 21

ATTORNEY'S signature _____ DATE September 19, 1975

▶ COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and forwarded to Court of Appeals.

Date order received	Estimated completion date	Estimated number of pages.

Date _____ Signature _____
(Court Reporter)

ORIGINAL

26

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
SEP 25 1975
TIME A.M.
P.M.

United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHEN LENT, DOMINICK SEMINARA,

Defendants-Appellants.

JUCK 765

Docket No. T 5189

FILED
U.S. DISTRICT COURT E.D. N.Y.
SEP 25 1975
TIME A.M.
P.M.

BEFORE: IRVING R. KAUFMAN, Chief Judge

The court noting that Robert Rivers, Esq. is counsel of record for Dominick Seminara and Albert Pincus, Esq.* and being advised as to the progress of the appeal and that notice of appeal was filed on Septebmer 19, 1975

IT IS HEREBY ORDERED that a copy of the transcript of testimony shall be filed with the Clerk of the District Court on or before October 15, 1975

IT IS FURTHER ORDERED that the record be docketed on or before October 2, 1975

IT IS FURTHER ORDERED that if the record is not docketed by the time directed, the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that the appellant may, without further order of the court, remove the record for purposes of preparation of the appellant's brief and appendix, provided that the record is returned to the custody of the court on or before the date set for filing the appellant's brief.

IT IS FURTHER ORDERED that the brief and appendix of appellant be filed on or before November 14, 1975

IT IS FURTHER ORDERED that if appellant's brief or appendix is not filed by the time directed, the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that the United States file its brief on or before December 15, 1975

IT IS FURTHER ORDERED that the argument of the appeal be ready to be heard during the week of December 22, 1975

* is counsel of record for Stephen Lent

A. DANIEL FUSARO,
Clerk

Dated: September 25, 1975

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

-against- :

STEPHEN LENT and DOMINICK SEMINARA : 74 CR 765

Defendants :

----------x

United States Courthouse
Brooklyn, New York

June 24, 1975
10:00 a.m.

B e f o r e

HONORABLE JOHN R. BARTELS,

U. S. D. J.

SHELDON SILVERMAN
Acting Official Court Reporter

Appearances:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: HAROLD FRIEDMAN, Esq.
Assistant U.S. Attorney
-and-
CHERYL SCHWARTZ, Esq.
Assistant U.S. Attorney

ALBERT R. PINCUS, Esq.
Attorney for Defendant Lent

ROBERT RIVERS, Esq.
Attorney for Defendant Seminara
-and-
MICHAEL STEVENS, Esq.
Co-counsel

THE COURT: Are you ready for trial, Mr. Pincus?

MR. PINCUS: Yes, I am.

THE COURT: Are you ready for trial, Mr. Friedman?

MR. FRIEDMAN: Yes, your Honor.

THE COURT: Where is the attorney who represents Seminara?

MR. PINCUS: I don't know. I did speak with his office yesterday. He said he would be here.

THE COURT: That's Mr. Robert Rivers. It is now five after ten. I think we'll give him a little leeway to appear. In the meantime, while waiting for him, I think we ought to discuss your motion.

MR. LENT: Thank you.

THE COURT: Which I must say is against the rules inasmuch as we told you all motions should be made by January the 17th, and now at the morning of the trial you serve the Government and the Court with a motion.

MR. FRIEDMAN: I'm sorry, I haven't received any papers.

MR. LENT: I know this.

THE COURT: This case is going to trial, Mr. Pincus. I have read your papers. Don't you

think the Government is entitled to a copy of your motion papers?

What, in effect, he says is that you are, or rather the prosecutor and the United States Government is not applying the law in an equal manner, but by failure to indict two other alleged participants in this fraudulent scheme, have been guilty of discrimination inasmuch as the words of a 1942 case, Skinner v. Oklahoma, the United States Supreme Court laid an unequal hand on those who committed intrinsically the same quality of offense and sterilized one and not the other. You thus made an invidious discrimination as if it had selected a particular race, a nationality. That's the first basis of the motion.

The second is that you would not permit Mr. Lent to appear before the grand jury, and in that respect he says you also have violated the law, and he's entitled to a dismissal of this indictment.

MR.PINCUS: Exactly correct.

MR. FRIEDMAN: I may be able to attempt to answer those at this point.

With respect to the defendant's or any defendant's right to appear before the grand jury, the law is crystal clear that no defendant has a

right to be invited nor a right to appear before a grand jury, and I would like to cite two cases for that.

THE COURT: Cite them.

MR. FRIEDMAN: The first case --

Might I get my file, your Honor?

THE COURT: Yes.

MR. FRIEDMAN: The most recent case is U.S.v. Elkins, Southern District, 1966, and I have a copy for the Court as well as Mr. Pincus, and in that case--

THE COURT: What citation? That's 259 F.Supp, (1966) at 236; is that right?

MR. FRIEDMAN: Yes, your Honor.

In that case they cite a Second Circuit case decided in 1974, U.S. ex rel McCan v. Thompson. That's 144 F.2d, 604. I will hand a copy of that to Mr. Pincus as well as to the Court. I apologize for the quality of the Xerox.

Without having read Mr. Pincus's papers which were just served on me at five after ten, his authority on the Skinner case, which of course had to do with sterilization, in no way applies to the case before us. There the court held there was an invidious discrimination. In our case, what we merely have is the prosecutorial discretion to prosecute, to decide to prosecute

those who the Government and the grand jury feels there was probable cause that a crime was committed.

THE COURT: Yes, I think Mr. Pincus's cases are pretty clear that a defendant has no right to appear before the grand jury.

MR. PINCUS: Might I heard?

THE COURT: Yes.

MR. PINCUS: I would like to say for the record I'm not in the habit of bringing motions on at this late date. I did have discussions with Mr. Friedman over the past two weeks. He knew the motion was coming. That's why he was ready.

THE COURT: That's why he prepared it.

MR. FRIEDMAN: It wasn't prepared for the Skinner case.

MR. PINCUS: Unfortunately my client was out of the state and I spent yesterday preparing these motion papers. I would, however, like to say I don't disagree with the cases he brought up. What I disagree with is the fact he has not given the opportunity to any of the four persons who were presumably originally involved in this situation, I would have no argument and no motion before the Court at this time. My argument lies in the fact that he did contact me as Mr. Lent's attorney and

tell me he wanted Mr. Lent to appear before the grand jury. He gave the same right to all other three proposed perpetrators and two of them were permitted to appear before the grand jury. No indictment was handed down as to those. The other two were never given that same opportunity and an indictment was handed down.

Well, your Honor and I both know as well as my adversary that we don't know what goes on in the grand jury room. At least I don't know, and perhaps if my client had been given the same right, the same opportunity as the other persons involved in this problem with him, perhaps he, too, would have walked away without an indictment or at least we would have known what the real basis of the indictment was.

All I'm saying is I have no quarrel with his cases, but I say that once he has given that right to two of the defendants or proposed defendants, he should have given the same right especially since he offered it to me, your Honor.

THE COURT: He offered and withdrew it, did he?

MR. PINCUS: No, he didn't.

MR. FRIEDMAN: Might I be heard.

THE COURT: Yes.

MR. FRIEDMAN: I have an affidavit from Mr. Lent, Mr. Stephen Lent. Originally what the Government did with the four targets of our grand jury investigation was, rather than have them hauled before a grand jury and have them raise their Fifth Amendment privilege, which we feel would have been prejudicial on their behalf in terms--

THE COURT: How do you know they're going to raise the Fifth Amendment?

MR. FRIEDMAN: I spoke to Mr. Pincus. I have his affidavit here. I would like to quote from Paragraph 4 of that affidavit. It's actually Mr. Lent's affidavit, but I'm sure it was prepared by Mr. Pincus's direction.

"That I am informed by my attorney that Assistant United States Attorney Harold Friedman informed my attorney that it would not be necessary for me to appear as I would give the answers to the above questions in this affidavit and refuse to answer any further questions other than those mentioned in the subpoena."

THE COURT: What were the bulk answers?

MR. FRIEDMAN: The questions in the subpoena had to do with documents. Under the Supreme Court case, U.S. v. Bellis, corporate documents are not

within the Fifth Amendment privilege; therefore if a potential defendant--

THE COURT: A corporation can't claim the Fifth Amendment.

MR.FRIEDMAN: And a defendant must indicate whether he has corporate documents in his possession or not.

MR. PINCUS: Which we did freely.

MR. FRIEDMAN: That was the limited purpose of the subpoena because we were informed Mr. Lent would have asserted his Fifth Amendment privilege to testify about the transactions that the grand jury was investigating.

MR. PINCUS: Your Honor, not only were we prepared to come in to testify, but Mr. Friedman himself--

THE COURT: What about the affidavit?

MR. PINCUS: He asked certain questions. We gave him the answers to those questions.

THE COURT: With respect to documents only.

MR. PINCUS: Those were the only questions he asked.

THE COURT: You said in the affidavit that your client would claim the Fifth on any other questions.

MR. PINCUS: Unless he informed me what type of questions it would be. He asked for information here which we did not have.

MR. FRIEDMAN: I would like the affidavit to be made part of the record, your Honor, and under the cases cited, I don't believe it's necessary to go into the details of Mr. Lent's refusal to testify before the grand jury.

THE COURT: You see what happens here, Mr. Pincus, is that the prosecution of a defendant depends upon the decision of a prosecutor. You'll agree to that.

MR. PINCUS: That's correct, your Honor.

THE COURT: He doesn't want to prosecute the other two parties who you think are involved, that's up to him.

Your real defense, your opportunity to be heard, you wish to be heard, would be before this court and moreover, it's the duty of the Government to prove your defendant guilty beyond a reasonable doubt. I think that with those rights, as of today, anyway, it has been held that a defendant has no right to appear before the grand jury.

Now let me read this affidavit.

(Said document read by the Court.)

THE COURT: Isn't that pretty clear?

MR. PINCUS: However, I would like to bring out that I still feel that the defendant has the same rights or equal rights as anyone else involved in the particular case. I also cite a case, because my adversary is upset about the Skinner case, I cite a 1972 case, which, again, says underlying principle of equal protection of laws--

THE COURT: Those facts of that case are not the facts in this case.

MR. PINCUS: The theory of law, with all due respect, may be applicable. I feel we have the same rights and privileges as anyone else and that if he had not invited the other two I would agree whole-heartedly with his opinion.

THE COURT: No, I don't think a defendant has a right to tell the Government how it should or should not prosecute a case against co-defendants or otherwise. I deny your motion.

MR. PINCUS: I specifically except.

THE COURT: In doing so, I must make a comment. I don't think Mr. Friedman can do anything about the comment. That is I always felt a defendant should have a right, whoever he may be, to appear before a grand jury if he so desires. I have never

understood why he should be excluded. After all, before an indictment is handed up, the grand jury should have all the facts.

MR. PINCUS: I concur.

THE COURT: If he requests it, I think a defendant should have a right to appear before the grand jury. It seems to me that's fair. Don't you think so, Mr. Friedman?

MR. FRIEDMAN: Yes, your Honor. In this case I think the affidavit indicates the defendant waived his right.

THE COURT: In this case -- Well, in the first place--

MR. FRIEDMAN: Waived the invitation.

THE COURT: In the first place, he has no right.

MR. FRIEDMAN: He has no right.

THE COURT: In the second place, assuming he had a right, you indicated to the Government, at least by this affidavit, that if he were invited he would claim that he would refuse to answer. I think you would be in the position, actually, of being estopped now that he refused the invitation.

I must say, laying all this aside, and this is indifferent, I have a strong feeling that a

defendant under any circumstances should have a right to appear before a grand jury.

MR. PINCUS: I appreciate that.

THE COURT: I can't change the law which has been, I think, enunciated by Judge Hand and many others. I believe it's up to Congress.

Where do we stand?

MR. PINCUS: I'm ready for trial.

MR. FRIEDMAN: I can start marking 3500 material.

THE COURT: What you've got to do here is put on the record, Mr. Pincus, you're ready for trial, which is true. You've got your witnesses here, and you, too, Mr. Friedman, are ready for trial, and you have your witnesses.

MR. FRIEDMAN: Yes, your Honor.

THE COURT: Mr. Pincus, isn't it true that you had notice that this case was set down for trial for this day way back--

MR. PINCUS: Marked peremptorily. I spoke to Mr. Friedman and I assured him I would be ready.

THE COURT: This was some time ago.

MR. PINCUS: At your Honor's direction. Your Honor's secretary called me to tell me it would definitely be reached, and I told her I would be

ready.

THE COURT: Did you have any contact with Mr. Rivers?

MR. PINCUS: Yes, I did.

THE COURT: Did you tell him on May 13th or when was your last contact?

MR. PINCUS: Yesterday, your Honor.

THE COURT: What does he say?

MR. PINCUS: He indicated to me that, at first, he had asked for a postponement in Mr. Friedman's office about two weeks ago, I believe, because of the fact he had a civil case on and you said this court would take precedence, if I remember correctly.

THE COURT: Because of the civil case?

MR. PINCUS: Yes.

THE COURT: How long was that?

MR. FRIEDMAN: It's my understanding the civil case was settled, your Honor.

THE COURT: He asked for an adjournment for a number of reasons here, and he's using this court, it seems to me, as a bargaining pawn to permit him to take such action as he wishes in any other court that he may have a case in.

I'm ready and you're ready.

MR. PINCUS: I spoke to his office and I told him I would be here and ready to go.

THE COURT: It's now ten-twenty, and Mr. Rivers has not appeared yet. This is not the first time that this Court has to put up with Mr. Rivers' dilatory tactics. We'll wait a few more minutes.

Is the defendant represented by Mr. Rivers here?

MR. PINCUS: No, I don't see him in court.

THE COURT: What's his name?

MR. PINCUS: Dominick Seminara.

THE COURT: Mr. Friedman, I think you had a case against Mr. Rivers once before, did you not?

MR. FRIEDMAN: A civil matter, Jones v. Lynn Spinning Hill case.

THE COURT: Yes. Did we not have difficulties arising out of his failure to appear on time in the Spinning Hill case? It seems to me we did.

THE LAW CLERK: I wasn't here.

THE COURT: I know there's always been-- Well, I can look up the docket sheets, documents. The last time we had a motion on, he didn't show until after the motion was decided.

MR. FRIEDMAN: That was in this case.

THE COURT: Yes.

We have the jury downstairs.

THE CLERK: Yes.

THE COURT: How many jurors?

THE CLERK: Seventy-five for three judges picking.

THE COURT: Generally how many does it take to impanel a jury of fourteen, assuming you have two alternates?

THE CLERK: The rule of Judge Mishler set down would be 40-45, depending upon various factors, roughly that.

THE COURT: All these people are here. All we can do is wait for the prima donna and see whether he will condescend and try this case this morning.

We'll have to ask you to wait until Mr. Rivers comes in.

How many witnesses do you have?

MR. PINCUS: On my own case I will have my client and four other witnesses.

THE COURT: Your client is here?

MR. PINCUS: Yes, but by the time we will be at the point where I need my witnesses--

THE COURT: Are they out of town?

How about you?

MR. FRIEDMAN: For today we have approximately nine witnesses.

THE COURT: Are they here?

MR. FRIEDMAN: They're--

THE COURT: How many do you have ready?

MR. FRIEDMAN: They're in the process of coming this morning. We anticipated we would be coming this morning.

THE COURT: I want to know so when Mr. Rivers is going to insist he not try the case, how many witnesses you have already subpoenaed and required, that's all.

MR. FRIEDMAN: Seven to nine for today, your Honor. We have people as far away as Indiana making preparations to testify for tomorrow.

THE COURT: I can do nothing except wait for his arrival.

Did you file your motion papers?

MR. PINCUS: I gave the original to the Clerk.

THE COURT: Take it down and this would be part of the record.

MR. FRIEDMAN: That's the Government's copy, but--

THE COURT: You can substitute. I'll be back.

(Recess)

THE COURT: Let the record show this court opens at ten a.m. We all had to wait an hour and ten minutes for the appearance of Mr. Rivers, who now appears before us for the trial of this case.

Very well, Mr. Rivers. You're ready?

MR. RIVERS: I indicate to the Court that I apologize for being late. I haven't been well.

THE COURT: You see, it's not only the Court, but there are other people here that have to wait, and you must be considerate of other people. There's no person who is entitled to special privileges which I find that you have taken.

MR. RIVERS: I understand that, Judge, but I have been sick.

THE COURT: I'm sorry about that.

MR. RIVERS: I'm ill standing here talking to you. I feel like I'm going to throw up.

THE COURT: What's the matter?

MR. RIVERS: I had an upset stomach for some time and my pressure is high.

THE COURT: You have a motion?

MR. RIVERS: My application before the Court is for continuance. I would like the record to bear out the fact that today is the second occasion on which the defendant Dominick Seminara is

requesting an adjournment, although this case dates back some time--

THE COURT: What do you mean by "a second time"?

MR.RIVERS: Only the second time that we have requested.

THE COURT: You requested one in March--

MR. RIVERS: In March.

THE COURT: I granted that.

MR. RIVERS: Presently.

THE COURT: You're not entitled to an adjournment as a matter of right.

MR. RIVERS: I understand that. I would like to point out to the Court the entire Government approach to the prosecution of this case has been bizarre from the beginning.

THE COURT: Wait a minute. Mr. Friedman, you're not listening here. You have your back to the Court.

MR. FRIEDMAN: I'm sorry. I'm listening, your Honor.

THE COURT: Mr. Rivers is attempting to point out the reason why he should have this adjournment.

MR. RIVERS: It started out as a prosecution which was pending before the grand jury and in the investigative unit of this office for about a year.

Then when it was presented to the grand jury there was an agreement between myself and Mr. Friedman on the telephone in the presence of other people whereby Dominick Seminara agreed to come in and testify before the grand jury with regard to two elements which were contained within a subpoena served upon him.

THE COURT: Did he come?

MR. RIVERS: He did come in prepared to testify at which time it was indicated he was indicted; that is the indictment had been drawn up, printed, and was handed to him, so that he did not get an opportunity to testify.

THE COURT: He can't be indicted until the jury returns the bill. Had this jury returned the bill?

MR. RIVERS: I assume so. He had a copy when he left here.

THE COURT: He had a copy, I guess, I don't know, of a proposed indictment that the U.S. Attorney generally prepares in advance, assuming they are going to be able to show probable cause.

Do you know anything about that, Mr. Friedman?

MR. FRIEDMAN: Yes, your Honor. I believe Mr. Seminara, through Mr. Rivers, his attorney, was

given several opportunities to appear before the grand jury solely to answer questions regarding various documents and on at least two occasions he did not appear and he finally appeared on the day that the grand jury was deliberating with respect to the indictment, without an attorney and at that time Mr. Ryan of our office inquired whether his attorney was present. He indicated he was not, and he was given a copy of the indictment to give to his attorney.

THE COURT: Was the indictment already returned to the court?

MR. FRIEDMAN: I believe it was not.

THE COURT: How could he give an indictment that was not returned?

MR. FRIEDMAN: It was a draft of the indictment.

THE COURT: Was the indictment returned in accordance with that draft ultimately?

MR. FRIEDMAN: Yes, that same day. Mr. Rivers would know whether it's the indictment verbatim or not. I didn't see the copy.

MR. RIVERS: It's the exact indictment.

THE COURT: Did your client want to testify?

MR. RIVERS: Yes, he was prepared to testify.

THE COURT: Mr. Rivers, while you were away we had a long motion prepared by Mr. Pincus as to whether or not the defendant has a right to appear before a jury, and he cited cases, and Mr. Friedman cited cases, and I think it's pretty clear the defendant has no right to appear before a grand jury. It's a proposition to which I do not agree, but that's the law. I think that ultimately Congress must change that provision and maybe the Supreme Court will. That's on the side of your particular client, but it's a matter of general principle.

I could be wrong, and apparently I am, but I certainly feel, Mr. Friedman, as a matter of practice, all United States Attorneys in the interest of fairness should give the defendant an opportunity to present his side of the case before an indictment comes down.

MR. FRIEDMAN: I agree, your Honor.

THE COURT: Because, even if this defendant is not ultimately acquitted, it's terribly unfair to have an indictment prepared without hearing the other side. I don't see how, really, a grand jury can come out with a probable cause indictment unless they heard the other side. You can't compel a defendant to come in, I don't think, can you?

MR. FRIEDMAN: No, your Honor. In fact, in this case Mr. Rivers indicated his client would take the Fifth Amendment, would only testify regarding the documents which are not under the Fifth Amendment.

MR. RIVERS: Those things requested in the subpoena would be testified to.

THE COURT: And not anything else?

MR. RIVERS: Those in the subpoena would be testified to. He was denied that opportunity.

THE COURT: You said he wouldn't have anything else to add except with respect to those documents.

Be that as it may, I'm talking about the general principle, and the circumstances.

Where do we stand?

MR. RIVERS: Another bizarre approach by the Government with regard to the discovery of material in its possession. At the time of an application made by myself and Mr. Pincus for his client--

THE COURT: I read your motion papers, Mr. Rivers.

MR. RIVERS: These things were directed--

THE COURT: I'll listen to Mr. Friedman as

to what happened and we'll find out. Let me look at the letters. Where are the motion papers? I saw them this morning. I have them here.

Let me ask you this, Mr. Rivers: Let's look at your papers --

MR. RIVERS: Might I add to this, Judge--

THE COURT: Wait a minute. These are the letters attached to your motion papers,is that right?

MR. RIVERS: That's correct.

THE COURT: Is that the one on November 15, '73 to the Federal Trade Commission?

MR. RIVERS: November 15th, and we have a copy of a letter dated November 12th, '73.

THE COURT: Is that attached?

MR. RIVERS: Which is attached also.

THE COURT: These are-- the first one is signed by your client. You've got me, Mr. Rivers. I'm going to put you to the same test you put me to.

MR. RIVERS: Read it?

THE COURT: You read it.

MR. RIVERS: I'm having difficulty.

THE COURT: You have the original?

MR. RIVERS: Straining, perhaps I can.

THE COURT: Is it the same Xerox?

First, who is it addressed to?

MR. STEVENS: The date is November 12, 1973. Foto Factory, Ltd, 240 Maple Avenue, Rockville Centre.

THE COURT: Foto Factory. That's your client.

MR. RIVERS: Dominick Seminara is the client.

THE COURT: That's the name of the corporation to which he was either a treasurer or president. What was he?

MR. RIVERS: President.

MR. STEVENS: "Dear Customer: Recently you may have received a special introductory offer of prepaid film processing envelopes valued at $22.10, which would cost you $9.95. We have discovered an error in our computer printout since mailing the offer to you. As a result of that error, the offer was incorrectly mailed to some customers who had not requested it and charges were processed to their Master Charge or Bank Americard accounts. If you are unable to use these items, we would appreciate the return of the merchandise. Upon receipt of this merchandise and if your account was among those inadvertently charged, we will issue a credit to your account. However, if you are waiting for a film order or processed pictures, please specify at the bottom of this letter. Please list below your name, address, credit card

account number in the space provided below. A self-addressed envelope is enclosed for your convenience. Very truly yours, Foto Factory." Below is a space for a name, address, and number.

THE COURT: To Foto Factory.

MR. STEVENS: It's addressed "Dear Customer."

THE COURT: What's the name?

MR. RIVERS: A letter to customers. It's alluded to in the covering letter sent to the Fair Trade Commission, signed by Dominick Seminara.

THE COURT: This is a letter to a customer, and the address I cannot make out is some name of a customer? It's not Foto Factory, right? I'm talking about the front.

MR. RIVERS: Just the address of Foto Factory, then it's "Dear Customer."

THE COURT: I don't get it.

MR. RIVERS: What it is, it's a form letter sent out to the Fair Trade Commission, indicating to them that the Federal Trade Commission--

THE COURT: That's another one. That's the preceding letter.

MR. RIVERS: I understand that. The letter was sent out by Mr. Seminara explaining to the Commission how it was he was attempting to satisfy

customers and indicating what form the letter took.

THE COURT: I understand that. There's three lines above here.

MR. RIVERS: That's only the address.

THE COURT: Who would it be, a customer?

MR. RIVERS: Foto Factory.

MR. FRIEDMAN: Foto Factory's address.

THE COURT: Foto Factory is writing a letter to itself?

MR. STEVENS: Attempting to be the inside address of the sender, at the top, as it should be on a piece of stationery. It was typed in this spot, but the salutation reads, "Dear Customer."

THE COURT: I'm puzzled as to what this thing means. What is this up here?

MR. STEVENS: Photo Factory, Ltd.

THE COURT: And Foto Factory signs the letter, is that true or not?

MR. RIVERS: Yes. Basically, what happened in this letter, it was a letter by Mr. Seminara attempting to explain to the Federal Trade Commission the actions he had taken with regard to customers. He sent an example of a letter that he was utilizing.

THE COURT: The example, unfortunately, had as the addressee the name left, Foto Factory, although that's unimportant, but that is what this

bizarre -- to use your words -- Xerox copy indicates, isn't it?

MR. RIVERS: No, they're not the addressee. It's a printed form, the addressor.

THE COURT: Don't call it the addressee. Tell me what this is.

MR. RIVERS: It says Foto Factory, Ltd., giving an address of Maple Avenue.

THE COURT: How can you read that?

MR. RIVERS: I can't.

THE COURT: You're reading something.

MR. STEVENS: I'm listening to what he says. Rockville Center, New York.

THE COURT: I'm making much ado about nothing-but I want to understand how you can send a letter to yourself and indicate--

MR. RIVERS: The letter was not sent to himself.

THE COURT: Ultimately it wasn't, but the form indicates it was.

MR. RIVERS: What it amounts to is an admission against interest, what it amounts to is material that should have been discovered, that should have been turned over.

THE COURT: Did you have it in your own files?

It was your letters.

MR. RIVERS: However, to receive a letter now from the United States Attorney on the eve of trial--

THE COURT: Did you write the letter?

MR. RIVERS: I didn't have this in my file. I didn't know the United States Attorney had it.

THE COURT: I mean your client's file.

MR. RIVERS: Recently came to his attention.

THE COURT: Who says this?

MR. RIVERS: Mr. Friedman. Then he indicates he has a cabinet of other documentation that we can look at at our leisure. This is no leisure between the time we received this and the time of trial.

THE COURT: What do you have to say about that?

MR. FRIEDMAN: At the outset, I would like to categorize Mr. Rivers' motion for yet another adjournment as an affront to this Court's diligent effort to have an orderly trial schedule and to comply with the Second Circuit rules regarding prompt dispositions. I believe that a brief recitation of the history of this case is in order.

The defendants were indicted on December 9,

1974 and they were promptly called to plead before this court on December 12, 1974.

At that time I indicated to Mr. Strassen, who appeared on behalf of Mr. Pincus and Mr. Rivers, that if they indicated to me what they wanted in writing I would respond and if they weren't satisfied with that, then they could come to the court. This Court at that time, on December 12, indicated that all motions should be made by January 17, 1975.

Mr. Seminara, through his attorney, Mr. Rivers, made a motion to dismiss the indictment and he did not make any request to me or to this Court through its motion for discovery.

Mr. Pincus, on behalf of his client, Mr. Lent, made a motion for certain discovery. On February 6th, 1975, approximately one week after the motions were heard, I sent a letter to Mr. Pincus indicating and responding to the particulars that he requested. I also sent a carbon copy to Mr. Rivers, and up until February 6, 1975, Mr. Rivers neither orally or in writing had requested any discovery from the Government.

I met with Mr. Rivers as late as June 9th and June 10th, in our office, with respect to this case, and with respect to particulars of this case

which did not include discovery, and at no time did he formally or informally demand discovery from the Government.

THE COURT: He takes the position that he didn't know you had a metal cabinet full of papers.

MR. FRIEDMAN: Your Honor, on June 20, pursuant to this office's request, the Nassau District Attorney, and I don't know if they had to get a court order, gave us three metal cabinets which contained sales slips. They were in our office in June 20, 1975, and at that time I wrote a special delivery letter to Mr. Pincus and to Mr. Rivers indicating that we were in possession of these documents for the first time and that they would be available for their inspection.

I also at that time, your Honor, although Mr. Rivers did not see fit to ask for discovery, felt as a matter of fairness I should turn over a letter that was in my file from his client to the Federal Trade Commission.

THE COURT: When did you turn that over?

MR. FRIEDMAN: That was sent on June 20, on Friday, special delivery, and Mr. Rivers could tell you when he got it.

MR. RIVERS: Monday.

THE COURT: What I want to know--

MR. RIVERS: That would be a good excuse, except for one thing: the Court specifically indicates on January 31, 1975, "You are to receive a bill of particulars and statements made by the defendant." It says it twice, this court, not a different court, directing the United States Attorney.

THE COURT: I can't imagine it being a different court.

Did you give him all particulars?

You must distinguish between evidence and particulars. There are some things you're entitled to and some things you're not entitled to. If he has any exculpatory documents up there, you are entitled to them, or any statements made by the defendant, but if these metal cabinets do not contain such statements, and they do contain evidence or documents he's going to use which would in no way deprive you of your rights, you're not entitled to them. That last statement is a general statement. I'm trying to point out that if Mr. Friedman has suddenly received an exculpatory statement, suddenly received statements made by the defendant, then, of course, you would have a right to look at them, but you don't need a week. You don't need a day.

You can look at them right now.

What do these metal containers hold, and why was it necessary for you to receive them? Weren't you prepared for trial?

MR. FRIEDMAN: Yes.

THE COURT: Before June what?

MR. FRIEDMAN: We're prepared for trial today, your Honor.

THE COURT: No, when did you get these metal cabinets?

MR. FRIEDMAN: Friday, and we're not attempting to introduce them into the direct case.

THE COURT: That doesn't completely answer the problem. You have some exculpatory documents, then he's got to know that. Have you?

MR. FRIEDMAN: Your Honor, after looking at the slips and we didn't look at all twelve or fifteen thousand, however many of them are there--

THE COURT: Thousands?

MR. FRIEDMAN: Thousands.

THE COURT: What kind of slips are they?

MR. FRIEDMAN: Credit card sales slips, copies.

THE COURT: Copies of credit card sales slips they made out?

MR. FRIEDMAN: Bank Americard and Master Charge.

THE COURT: At least it's not in the category of statements made to any agent of the Government.

MR. FRIEDMAN: No, your Honor.

THE COURT: No written statements or even oral statements made through any agents of the Government by these defendants; is that right?

MR. FRIEDMAN: That's right, your Honor. These are slips that the defendants would know about.

THE COURT: Has the case been tried in the state court or similar case?

MR. FRIEDMAN: No, your Honor. The defendants were indicted in the state court case, and I don't know if they made any demand for discovery there. Maybe they were informed of the seizure by the state.

THE COURT: What is the prosecutor subsequently doing with these documents?

MR. FRIEDMAN: They were seized in connection with their prosecution of the defendants out there.

THE COURT: I asked you if they were prosecuted out in Nassau County. You said you don't know. What were they doing, what would the prosecutor be doing with these papers if he didn't prosecute the defendants?

MR. FRIEDMAN: The defendants are being prosecuted in Nassau.

THE COURT: Are being, have not yet been. is that the story?

MR. FRIEDMAN: They have been indicted, and have pled. The attorneys could fill you in on that.

MR. PINCUS: If I may, on behalf of my client, Mr. Lent, there was a plea in the nature of a Cerrano plea to the effect my client took the position although he felt he was not guilty, in order to bring this matter to an end because of the fact he was ill and no longer living in the state--

THE COURT: He wasn't tried?

MR. PINCUS: No, he was. As a matter of fact, since that plea, this prosecution began and as a result of that I made a motion recently before Judge Lopera, State Supreme Court Justice who was handling the matter, for permission to withdraw our previously entered plea of guilty to one charge and to proceed to trial in that matter. That motion was subsequently denied, and I filed a notice of appeal and that appeal is now pending in the Appellate Division, Second Department.

THE COURT: We come back to what's in the cabinets. You were prepared to go to trial without that material?

MR. FRIEDMAN: Yes, your Honor.

THE COURT: You still are?

MR. FRIEDMAN: Yes, your Honor. I have a copy of a letter I sent to Mr. Pincus I would like the Court to see, on February 6, 1973, and in it-- he asks for discovery regarding his client, and the letter responds to that specifically, and a copy of that was sent to Mr. Rivers.

(A document is handed to the Court by Mr. Friedman.)

THE COURT: Are these documents that you refer to that the prosecutor of Nassau County had taken from the defendants? Is that right?

MR. FRIEDMAN: I believe taken from their premises.

THE COURT: From the corporation.

MR. FRIEDMAN: Corporation's premises.

THE COURT: Of course, I have to know the nature of the case a little more in detail to be able to say anything about it. They are in the nature of sales slips that the officers of this corporation made out.

MR. FRIEDMAN: Yes.

THE COURT: No exculpatory papers or documents?

MR. FRIEDMAN: I don't believe under Brady, your Honor.

THE COURT: That's what I'm interested in, any Brady material there that you have.

MR. FRIEDMAN: Just the $9.95 charge slips, Honor, in connection with this $9.95 charge which is the basis of this indictment.

THE COURT: $9.95?

I'm not familiar with the numbers as you are. What do you mean by $9.95.

MR. FRIEDMAN: It's an amount of money. The indictment alleges the defendant carried out a fraudulent scheme in which they billed previous Foto Factory customers on their Master Charge, in which they billed $9.95.

THE COURT: Tell me something about $9.95.

MR. FRIEDMAN: These are the copies that are retained by Foto Factory when they were preparing these unauthorized billings, the Government alleges.

THE COURT: What do you have to say? We're going to go to trial, Mr. Rivers.

MR. RIVERS: Specifically, you indicate I'm

entitled to any evidence illegally seized. You say that back in January, 1974.

MR. FRIEDMAN: No motion was made, your Honor.

MR. RIVERS: Specifically, the Court directed the United States Attorney to turn these over.

THE COURT: He didn't seize them. He didn't have it.

MR. RIVERS: He has them now.

MR. FRIEDMAN: Such a motion would be entertained at the time of trial. Isn't that the practice of this court?

MR. RIVERS: He has them now. Based on the fact he served this on me, he doesn't indicate it's in his possession at all times. He says, "The enclosed letter from Dominick Seminara to the Federal Trade Commission has recently come to my attention." Recently come to his attention?

He either had them or didn't have them.

THE COURT: He can have them recently. Did you have them in January?

MR. FRIEDMAN: Mr. Rivers, would you like to answer for me?

MR. RIVERS: You had them in January.

THE COURT: You had them too, Mr. Rivers.

MR. RIVERS: No, I did not.

THE COURT: You had the statements; your client had the statements, unless you closed shop you did. Did you close the business up?

Is this company still operating?

MR. RIVERS: It's not operating.

THE COURT: When was it closed?

MR. PINCUS: I think closed before the first of the year.

THE COURT: And the prosecutor obtained documents. Well, if he states he does have no exculpatory statements in there and you have had a chance to view it.

MR. FRIEDMAN: Yes.

THE COURT: We'll proceed to trial and let you look at it during the trial and before. A lot of this is plain, unadulterated evidence which you wouldn't be entitled to see it.

MR. FRIEDMAN: As a matter of courtesy, that letter was sent to the defendant, not as a matter of law.

MR. RIVERS: The Court directed it.

THE COURT: What's my phraseology?

(A transcript is handed to the Court.)

THE COURT: That's January and this is June.

There's quite a number of months. That's why I say we must have this trial.

I don't know what he means by "evidence illegally received." You had your bill of particulars. A bill of particulars is one thing and evidence is another.

MR. RIVERS: On the eve of trial.

MR. FRIEDMAN: He never asked for a bill of particulars.

THE COURT: What particulars do you want?

MR. RIVERS: As I understand it, there are certain admissions to be used here, admissions made to consumer groups, the Bankruptcy Court.

THE COURT: What admissions? Made by your client?

MR. RIVERS: Admissions made on tape, stenographic minutes under oath without the benefit of an attorney. He knows about these things.

THE COURT: Do you know what he's talking about?

MR. FRIEDMAN: Your Honor, there was testimony, other testimony before the Attorney General, Consumer Affairs Department by Mr. Seminara. I have a copy of those minutes which I have turned over, and I'm going to give him copies now.

MR. RIVERS: Now?

THE COURT: You could have gotten copies.

MR. RIVERS: I asked for those copies.

THE COURT: You could get them from the Attorney General, can't you?

MR. RIVERS: We couldn't get them.

THE COURT: What attorney general are you talking about, the state?

MR. RIVERS: State.

THE COURT: He doesn't have control over the Attorney General of the state.

MR. FRIEDMAN: As a matter of courtesy, I'm turning them over.

MR. RIVERS: On the eve of trial.

THE COURT: No, the day of trial.

MR. RIVERS: The other thing to keep the record straight, we have what purports to be a stipulation--

THE COURT: Who did that?

MR. RIVERS: Mr. Friedman.

THE COURT: I never saw it.

(A document is handed to the Court by Mr. Rivers.)

MR. RIVERS: It's the actual heart of the case. He wants us to stipulate.

THE COURT: You don't have to stipulate.

MR. FRIEDMAN: We're saving calling a lot of witnesses. I would like the record to indicate I turned over to Mr. Pincus and Mr. Rivers Mr. Seminara's testimony before the Attorney General, Consumers Affairs Department. I'm giving Mr. Rivers a copy of the minutes of Mr. Rivers' client's plea in the state court.

THE COURT: Your client pleaded too, did he?

MR. RIVERS: Yes. I didn't represent him in state court.

THE COURT: What do you call that plea?

MR.PINCUS: Cerrano plea. Nolo contendere.

THE COURT: I don't identify it in that matter.

MR. RIVERS: Is it the Court's position I'm going to be ready for trial and go through the material?

THE COURT: We'll impanel the jury and we'll have to start, Mr. Rivers, there's no question about it. I can't stop it because this is not the state court where you have a lot of cases ready. If one isn't tried a judge can try another. That used to be so in the master calendar case. With the assignment system, the defendant gets the benefit which he wouldn't have in the master calendar case,

which indicates a day certain which obligates the court to try it on that day. That would leave the Court and the staff dangling and it also has prevented others who wish that time period for the trial of this case from proceeding. It just creates a big void, and it interferes with the administration of justice and also as far as I see, even the fair and equitable treatment of the defendants.

It has to be tried unless there is an emergency of some kind. Very seldom that it's that situation present. Indeed, I have no trouble. These cases go along with many of these other judges, just on that kind of schedule. It has to be, or the assignment system wouldn't work. Therefore the trial has to be. Of course, sometimes a fugitive, a person, doesn't appear. That is, a client. Then we have to have a bench warrant for him, and the judge, of course, is then deprived of an opportunity to use his available time which he set aside for the case.

Lawyers have no right to ask for that kind of adjournment, and we can't tolerate it. Not because we want to be tough, but because we have an obligation to try cases and to keep the calendar moving, which is already clogging up with far too

many cases. We have to try this case, Mr. Rivers. We'll give you an opportunity and we may stop earlier one day, to give you an opportunity to look at this metal cabinet.

As I see it, these documents only came into Mr. Friedman's possession just on Friday, was it?

MR. FRIEDMAN: Friday, your Honor.

THE COURT: As far as he's concerned, he's looked at them and they're simply evidence and no exculpatory statements; however, in the course of the examination if you find any exculpatory statements, we'll give you an opportunity to review it before the end of the trial and you can use it.

MR. RIVERS: I point out to the Court this is tantamount to denying the defendant a fair trial.

THE COURT: You have the right to put that on the record and other statements.

MR. RIVERS: I'm not prepared for trial.

THE COURT: There's no reason you shouldn't have been. We had this case going since December and it's a mail fraud case, and the indictment is very full and gives, I think, the particulars in itself, and there's no reason why this case, like any other cases, and many of them should not shoot

right along.

Having the case since last December, and now saying you're unprepared doesn't make any sense to me. Indeed, the mere fact that he gave you a statement here, which is a statement I have read, doesn't seem to me to affect your ability to proceed with the trial in any manner, shape or form.

Mr. Pincus is ready for trial. We're going to have to try the case. We can't keep this up.

Has sentence been imposed on your defendant in the state court?

MR. PINCUS: Not yet.

THE COURT: You can't use this court for bargaining purposes or any negotiation between the state court and this court.

MR. RIVERS: I don't represent Mr. Seminara in the state court.

THE COURT: You did not?

MR. RIVERS: No.

THE COURT: Anyway, we're ready. The jury has been called. The jury is waiting. Money has been spent and will be spent for these jurors. I'm ready and I think we ought to impanel the jury immediately.

MR. RIVERS: Except to the Court's ruling.

THE COURT: Motion for adjournment is denied.

MR. RIVERS: I specifically except.

THE COURT: Call up the jury.

(A jury of twelve and two alternates were duly impaneled and sworn.)

THE COURT: Ladies and gentlemen, you just took an oath to render a just and true verdict in this case according to the evidence and according to the law. Now, by taking this oath, you became a part of the administration of justice in this case, and with you as jurors and me as the judge, we'll be here to see that justice is done between the parties according to the evidence and according to the law as I will state that law to be in the charge which I will give you at the conclusion of the trial.

This is not an ordinary duty, ladies and gentlemen, because yours is a very important function with respect to which you should have the same sense of duty and the same sense of fairness and the same sense of honesty of decision which should characterize the judge on the bench.

You should be as far as that's concerned in the same category as the judge. You judge the facts and I'll tell you what the law is.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

: 74-CR-765

-against-

:

STEPHEN LENT and
DOMINICK SEMINARA, :

Defendants. :

----------x

United States Courthouse
Brooklyn, New York

June 30, 1975
10:00 o'clock A.M.

B e f o r e :

HONORABLE JOHN R. BARTELS, U.S.D.J.

BURTON SULZER
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: HAROLD FRIEDMAN, ESQ.
Assistant U.S. Attorney
-and-
CHERYL SCHWARTZ, ESQ.
Assistant U.S. Attorney

ALBERT R. PINCUS, ESQ.
Attorney for Defendant Lent

ROBERT RIVERS, ESQ.
-and-
MICHAEL STEVENS, ESQ.
Attorneys for Defendant Seminara

THE CLERK: Government's Exhibit 3500-20-24, last dated 10/30/73, Frances Goller, marked.

(So marked.)

THE COURT: Do you have an application to make, Mr. Friedman?

MR. FRIEDMAN: Yes, your Honor.

THE COURT: Let's have it.

MS. SCHWARTZ: Your Honor, on Thursday during the testimony in the afternoon there was something that came up that I would like to bring up now. I believe that Mr. Lent's son is sitting at counsel table --

THE COURT: When you turn your face from me I can't hear you. You believe what?

MS. SCHWARTZ: That Mr. Lent's son is sitting at the defense table to assist Mr. Pincus and on Thursday he made what seemed to me to be innumerable excursions between counsel table and the outside and it distracted me quite a bit, and I believe that the jury also was distracted.

THE COURT: He won't be there this morning.

MR. PINCUS: May I say this, your Honor --

THE COURT: You have no right to have that.

MR. PINCUS: He is not a witness and he has been very helpful to me in preparing certain papers

for me and getting my papers together and --

THE COURT: I know, but he has to act properly. He can't do that. We don't have people having excursions running in and out of the courtroom.

MR. PINCUS: I will instruct him that if he wants to help me he will have to remain.

THE COURT: Is he here now?

MR. PINCUS: He is parking the car, your Honor

THE COURT: I will be very careful in watching him. If I find any infringement of the decorum of the courtroom he will not be able to sit in.

MR. PINCUS: If counsel had told me that I would have instructed him on the way in.

THE COURT: What other applications?

MR. SCHWARTZ: The other application pertains to --

THE COURT: Mrs. Schwartz, you better learn now if you are going to address the Court you must look at the Court and now you are looking at Mr.Pincus. I can't hear you when your voice is directed in the other direction.

Can you try to do that?

MS. SCHWARTZ: Yes. I'm sorry.

THE COURT: What is your other application?

MR. SCHWARTZ: The other application pertains

to a potential defense which counsel may bring up. Several times they have mentioned in conversations with us that the two defendants are in very poor health, but the Government doesn't feel that that is a relevant --

THE COURT: That is not a defense at all. That is something that the Court must take into consideration at the time of sentencing, if the defendants are found guilty. But it is no province of the jury and it certainly is not a defense and is not the proper subject of testimony here.

MR. PINCUS: Your Honor, I don't know where she got the idea that that would be a defense. It certainly is not. We never brought it up in the courtroom.

THE COURT: You never brought it up to me.

MR. PINCUS: We brought it up in discussions with counsel when we attempted to work out something.

THE COURT: That is perfectly proper.

As a matter of fact, you said it to me in my chambers, and that was all right.

MR. RIVERS: Judge, I have an application. At 3:00 o'clock I have an appointment --

MS. SCHWARTZ: I just wanted the record to reflect whether or not Mr. Rivers --

THE COURT: Who are you talking to, Mr. Rivers or me?

MS. SCHWARTZ: Mr. Rivers, your Honor.

THE COURT: I would rather have you talk to me so I can hear what you say.

MS. SCHWARTZ: I would like the record to reflect whether or not Mr. Rivers heard our last application pertaining to the health of the defendants.

MR. RIVERS: I heard all the applications.

THE COURT: He knows about that.

MR. RIVERS: As far as the health of the defendants is concerned --

THE COURT: He is not going to mention that on direct, indirect or any other time.

That is the subject matter which the Court takes into very serious consideration at the time of sentencing any defendant, if that defendant is ever found guilty.

MR. RIVERS: I don't think that has any bearing on anything anyhow.

THE COURT: It is what you call an anticipatory defense against a defense.

MR. FRIEDMAN: Your Honor, the Government has two more applications if we may get them out of the way.

THE COURT: Yes.

MR. FRIEDMAN: I have spoken with Mr. Trager regarding the office policy with respect to recommendations in cases such as this and we have carefully reviewed the facts of this case again and I wanted to indicate to the Court, as well as to the defense attorneys, that that policy continues in this case.

THE COURT: I don't know what that means.

MR. FRIEDMAN: That means, your Honor, that the Government -- with respect to a possible plea, that the Government would not --

THE COURT: Forget it.

MR. PINCUS: May I say it for the record, your Honor, that in retrospect after our conversation, I intended to come in and withdraw that offer, in any event.

THE COURT: Yes.

MR. RIVERS: I agree with that, Judge.

Two things: At 3:00 o'clock I have an appointment with a heart attack unit --

THE COURT: You can't interrupt this trial. If you got a heart attack --

MR. RIVERS: I have no heart attack, Judge. I am being monitored for a heart attack. I have high

blood pressure.

THE COURT: Tell me what it is. You say you have a what -- you want to go to the doctor?

MR. RIVERS: That's correct.

THE COURT: Y didn't say it that way. It is not a committee meeting on heart attacks?

MR. RIVERS: No.

THE COURT: Here is the problem, gentlemen. I don't want this case to extend over the 4th of July. If you have a doctor's appointment at 3:00 o'clock for high blood pressure--

MR. RIVERS: The condition is there and is not inhibiting me at all.

THE COURT: How can we work the thing out satisfactorily to you and at the same time not interfere with the trial so we can get it finished?

MR. RIVERS: Last Monday I missed my appointment. This Monday there is another appointment.

THE COURT: Last Monday you didn't miss your appointment because of me because we didn't have a trial.

MR. RIVERS: You began Monday, your Honor.

THE COURT: Tuesday.

MR. FRIEDMAN: We picked the jury on Monday.

THE COURT: We started Tuesday.

MR. RIVERS: I didn't go.

THE COURT: Anyway, it was the day you had your appointment, is that what you are saying?

MR. RIVERS: I have another one today and I will have to miss it again.

THE COURT: Why did you make it for that time?

MR. RIVERS: They made it for me.

THE COURT: How many witnesses have you got to go?

MR. FRIEDMAN: We would certainly like to accommodate Mr. Rivers. We could schedule our witnesses so we can go until maybe 1:30 and then -- or go right through and then he could leave for his appointment.

MR. RIVERS: I have no objection in going right through.

THE COURT: You mean without lunch?

MR. RIVERS: Yes.

THE COURT: What about these people? I can't impose that hardship.

MR. RIVERS: Sometimes they have the facility in the State Court to have lunch for the jury in the jury room.

THE COURT: We can easily do that but it takes about an hour.

MR. FRIEDMAN: What if we went -- what time does Mr. Rivers have to leave for his appointment?

MR. RIVERS: I have to be there at 3:00 o'clock.

THE COURT: I can go as long as you possibly can, as far as I am concerned.

Let me ask you this: Before we make any ruling on that, let's see where we are going. You have how many more witnesses?

MR. FRIEDMAN: Your Honor, aside from previous customers, we have approximately seven more witnesses.

THE COURT: How many more previous customers do you have?

MR. FRIEDMAN: Well, with respect to previous customers, we have approximately --

MR. SCHWARTZ: A minimum would be about seven more.

MR. FRIEDMAN: Minimum of seven more.

THE COURT: Listen to this, he has fourteen more witnesses.

How many witnesses have you got?

MR. RIVERS: At least ten or twelve, Judge. Excluding the defendants if they take the stand.

THE COURT: Don't exclude them. You have fourteen, too, right?

MR. RIVERS: Yes.

THE COURT: Twenty-eight witnesses.

Let's get this thing down. It is obvious that we are not going to finish this before the 4th of July and I don't know whether we will finish before Labor Day, but we have to plan for it.

We are going to have to be -- to discipline ourselves and we are going to have to stay longer. You have to be fair to the jury at the same time, but this case is obviously going to go right straight through to the 15th of July at this rate but --

MR. FRIEDMAN: Your Honor, I would again ask the defense attorneys, in view of the testimony of the previous card-holders, if they would again consider a stipulation?

THE COURT: Consider what?

MR. FRIEDMAN: Consider a reasonable stipulation so we don't have to call the other seven card holders.

THE COURT: I can't make the defense stipulate to any facts. It is a waste of time and I think they ought to consider stipulations if all these other card holders are just going to repeat what everyone else said.

I don't know that it helps their clients not to stipulate, but that is up to them. You have the

burden. You can't force them to make any admissions whatsoever.

MR. FRIEDMAN: Thank you, your Honor.

THE COURT: What time do you want -- gentlemen, I have got to know because I have a schedule of other cases now.

I don't know what we can do to shorten this trial.

MR. PINCUS: Could we shorten the lunch hour?

THE COURT: I can do it. Have you ever been out trying to get lunch here at restaurants?

The only thing we can suggest is perhaps getting procedure of having lunch sent in every day, but that takes an hour by the time these restaurants send them in; you'll be surprised how long it takes.

MR. FRIEDMAN: I would think that the jurors would need some air, at that hour to get outside and get some air.

MR. RIVERS: I am not opposed to working late, Judge.

THE COURT: Would you come back today?

MR. RIVERS: I will come back after they let me go, yes.

THE COURT: How do you know what time you are

going to come back?

MR. RIVERS: I don't know.

THE COURT: Don't make any more appointments during the day. Make them at night. I can't take the time, not because I don't want to cooperate with you, but because this case is now going to extend so long that we can't afford any more time off for any excuses.

It is now twenty after ten. Call in the jury.

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1 MR. FRIEDMAN: Your Honor, I would like to call one other thing to the Court's attention. I notice the Court, the first few days of the trial making what I consider to be appropriate and concerned inquiries with respect to some of the procedures that took place at Foto Factory Limited and more particularly with regard to the depositing of the credit card charges with the various banks.

There will be testimony with respect to the charges, but that will take place at a later date when the people --

THE COURT: In other words, I should be patient and not make inquiries, is that it? I only make the inquiries because I don't understand it myself. If I don't understand it I assume the jury doesn't understand it. That's the only reason.

MR. FRIEDMAN: I appreciate the inquiries, your Honor.

THE COURT: I hesitate to do it, but I must know what is going on. If you don't make it clear to me, you don't make it clear to the jury -- and that goes for you, too. That's the only purpose.

MR. BARETTA: Your Honor, I would --

MR. FRIEDMAN: Is Mr. Baretta going to be before this court of counsel?

THE COURT: I don't know.

MR. BARETTA: Your Honor, the reason I'm prompted and motivated to make the statement that I am going to make, will be very brief, is the recognition and realization that we are here confronted with an imposition upon the administration and conduct of the trial vis-a-vis the fact that it will go so long on a subject matter that for all practical purposes, at least in my mind, has already been covered in another jurisdiction and being a matter that took a year to come to indictment on what total is a $500 sum of money here.

We discussed this off the record and brought it to the attention of the Court, as your Honor knows, and I was under the impression that there was going to be a continuance of this kind of examination vis-a-vis a conclusion on the practical basis of the administration of justice in this particular case. I was under the impression that today, that today, other than the remarks made by Mr. Friedman, regarding the disposition of this matter that there might have been an interjection by your Honor in a consideration of some kind of conclusionary decision in the area of concluding this matter here in a form of disposition.

Your Honor knows my sentiments. I think I have made them clear. I have certain concerns in the area

of disposing of the matter as quickly as we can because it's been a terrible imposition -- this matter has been going on for literally two years now, and it's a terrible burden and pain on all of parties involved, including the attorneys, as a matter of fact. And to prolong this any longer would be an injustice to all concerned and would not be in the best interest of justice.

All I can ask for now is some kind of an answer, if it's within your province, your Honor, as to whether or not we proceed today or we further discuss the avenues we have travelled on regarding the disposition of it.

That's all I wanted to say.

THE COURT: Of course, Mr. Friedman, I must tell you and tell Mr. Rivers and Mr. Pincus that I met Mr. Trager in the elevator, I think it was Friday, and I got him aside in the lobby and I told him that he ought to consider what kind of recommendation he would make and that might or might not lead to some kind of conclusion, that is to say, instead of saying he would recommend jail, as to whether he would be willing to say what length of jail term he would recommend. Long, short, et cetera, et cetera.

The statement this morning by Mr. Friedman was somewhat of a disappointment, and he came down with a

4 statement that we adhere to our original policy. That isn't helpful. I can adhere to my original policy, you see, that you have to be realistic. That is no way to handle the matter. You can say, no, I won't, but this brand statement, "I adhere to my original policy," is not a step forward, is it?

MR. BARETTA: Your Honor, let me say this, I have a great affection and respect for Mr. Friedman and for his associates in this case, and I have a warmth of feeling for Ms. Schwartz and for David Krusala, -- I don't want to extend it beyond the bounds of propriety.

AP fls.

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MR. BARETTA (Cont'd): I put it to him that he has in many respects I consider been a terrible intercepter of a realistic disposition here.

I believe that he's made Mr. Trager a captive of his own ambition in this case.

THE COURT: This is all speculation. We don't know anything about that.

MR. BARETTA: They wait a year before --

THE COURT: I don't think Mr. Trager can be made a captive of anyone.

MR. BARETTA: I don't know, your Honor, because he hasn't responded to you and uses Mr. Friedman as a instrument to come in with a planned statement.

THE COURT: I don't care about that.

MR. BARETTA: I thought there might have been some --

THE COURT: I don't care about that. I can understand that he might take a stand that here I will not retreat from my policy of insisting upon some jail term.

That I can understand.

MR. BARETTA: Except when we were negotiating with Mr. Friedman this matter of jail never came up until the eleventh hour, the day before trial. He

misled us there and he misled us when he didn't allow Mr. Seminara to testify before the Grand Jury.

They are aggressively ambition in this case, your Honor.

THE COURT: Mr. Baretta, this is not a plea-bargaining Court. Your comment might be more applicable in the State Court. I can't go into that.

MR. BARETTA: Thank you most kindly.

THE COURT: They have a right. I have to respect it. I have no right to plea bargain. I make practical suggestions which --

MR. BARETTA: That is appreciated.

THE COURT: -- which apparently fell on deaf ears. They are the prosecutor. I am not.

I must divorce myself from their office, as I do from your defense.

MR. BARETTA: They should have the courtesy to respond directly to you, not to a lieutenant, Mr. Bartels -- I mean, Mr. Friedman.

MR. FRIEDMAN: A corporal, your Honor.

THE COURT: I think Mr. Trager -- never mind.

All right.

MR. FRIEDMAN: For the record, could Mr. Baretta just indicate who he represents? That is not on the record.

THE COURT: I don't care who he represents. I think he represents one of these individuals apparently in --

MR. RIVERS: He's co-counsel to me.

THE COURT: But he's not going to be -- we are only going to have one attorney for each defendant.

MR. RIVERS: I'll try the case.

MR. BARATTA: I would never interfere with the process of affecting the trial, merely the other area we had covered.

THE COURT: What is next?

I am going to call the Jury in about three minutes.

MR. PINCUS: Getting back to more mundane things, I had a motion which your Honor asked me to hold until this morning withrespect to the witness that was on the stand at the time that we adjourned on Thursday.

If I may, you asked me to make that motion this morning. The motion was two parts: First, that under the best evidence rule, I would ask, and I think your Honor already indicated, that the Xerox copies of these envelopes in connection with the mailers that were shown to this witness, Mr. Schroeder,

should not be permitted into evidence --

THE COURT: I imagine what he's going to do is give testimony that the originals were destroyed, because -- or something like that, if that is true, and then, of course, the Xeroxes are permitted.

MR. FRIEDMAN: We are withdrawing, your Honor, any identification or offer in evidence at this time of the photostatic copy.

MR. RIVERS: Just a second. Can the Jury be so advised with regard to this withdrawal?

THE COURT: It is only --

MR. RIVERS: It is exposed before the Jury.

THE COURT: You have to let me finish speaking.

As to the Xerox copies, I think we took them only subject to connection.

MR. FRIEDMAN: They were not offered in evidence, your Honor. All I did was ask him to identify them and your Honor instructed me not tohave him identify them at that time.

So there was nothing done in front of them.

MR. RIVERS: He took them one at a time and had them marked and called them up.

THE COURT: We will tell them to forget the Xerox copies.

MR. RIVERS: Forget all copies, if they are

going to withdraw them.

THE COURT: No, no. Just the Xerox copies. That's what we are talking about.

MR. RIVERS: I understood Mr. Friedman to say he's going to withdraw the offer totally.

MR. FRIEDMAN: Of the Xerox copies at this time, your Honor.

THE COURT: We will tell the Jury to forget any testimony with respect to Xerox copies.

MR. PINCUS: With respect to the balance of the copies, the originals, I would ask again that they not be permitted in evidence and that the Jury be instructed --

THE COURT: They have just been identified.

MR. FRIEDMAN: Five have been admitted in evidence through the testimony of five previous customers. There are --

MR. PINCUS: I have no objection to them.

MR. FRIEDMAN: There are 33 more, your Honor, that Mr. Schroeder, on Friday, identified as 33 envelopes that he had prepared.

THE COURT: Are you going to offer them?

MR. FRIEDMAN: What I would intend to do, your Honor, this morning, is to ask Mr. Schroeder to again identify the ones in evidence and ask him if

he prepared them.

THE COURT: They are already in evidence.

MR. FRIEDMAN: I want him to identify those as ones that he had mailed out.

MR. RIVERS: He already indicated that.

THE COURT: All right. No more argument. Too much time is spent on arguments here. I'm going to get awfully strict. We are wasting too much time.

MR. FRIEDMAN: Your Honor, with respect to 33 that are original that are marked for identification, I will ask Mr. Schroeder again if he can identify them and if he can, then I will attempt to offer those in evidence.

MR. RIVERS: He has never said these were the exact ones he prepared.

MR. PINCUS: He said it appears to be.

THE COURT: How can I hear Mr. Rivers while you are talking?

MR. RIVERS: He has said it appears to be.

On Friday, the last thing done by Mr. Friedman, your Honor, was to make an offer of these. With regard to argument --

THE COURT: Thursday.

MR. RIVERS: On Thursday.

An offer was made of the 33 alluded to now by Mr. Friedman. At that point there was an argument as to that offer.

Now, Mr. Pincus offered an argument at that point and the Court indicated that on resuming today, Mr. Pincus's argument, as to the offer of the 33, would be heard.

Now, for Mr. Friedman to again go over and make an identification of the five already in evidence and make another offer is gilding the lily, doesn't have to be done, has already been done.

He made an offer.

THE COURT: The five are already in. I am going to decide the procedure to be adopted here and I think that if he wants to identify those in order to connect them up with the others -- is that what you are trying to do?

MR. FRIEDMAN: Yes, your Honor.

THE COURT: It is perfectly proper. How are you going to get the others in?

MR. FRIEDMAN: With respect to the 33 marked for identification, as I did on Friday, I will again ask Mr. Schroeder to look at them and to indicate whether these 33 are envelopes that he sent out. He will testify, your Honor, that "I don't remember

the specific names, but they appear to be."

Then I sill ask him how they appear to be. He will say, "Well, the envelopes are the envelopes I used. The tape is the same size tape that I used. It's the Foto-Factory meter which I used --

THE COURT: I will permit it.

MR. PINCUS: Except, your Honor --

THE COURT: This has been done again and again.

MR. PINCUS: He said, your Honor, that other people have been working on these.

THE COURT: I will permit it.

Bring in the Jury.

MR. PINCUS: Respectfully except, your Honor.

MR. RIVERS: Exception.

THE COURT: I'm not going to argue this ad infinitum.

Bring in the Jury.

You be careful. You can't be running in and out.

MR. PINCUS: I have instructed him, your Honor.

(Jury present.)

(Continued on next page.)

F R E D E R I C K S C H R O E D E R , called as a witness, having been previously sworn by the Clerk of the Court, resumed the stand and testified further as follows:

THE COURT: Mr. Schroeder, you are reminded that you are still under oath. Do you understand that?

THE WITNESS: Yes.

THE COURT: How about this electronic device you have here, is it working?

THE WITNESS: Yes, sir.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. FRIEDMAN (Cont'd):

Q Mr. Schroeder, would you please look at envelopes in evidence, Government Exhibits 1-A, 2, 4, 5 and 13.

A Yes.

Q Can you tell the ladies and gentlemen of the Jury whether you are able to identify those envelopes as envelopes that you prepared and mailed to various people who appear on those envelopes in connection with the $9.95 charges?

MR. RIVERS: Objection as to form, your Honor.

THE COURT: Overruled.

MR. RIVERS: Exception.

THE WITNESS: They appear to be.

THE COURT: Wait a minute, which ones are we talking about?

MR. FRIEDMAN: Your Honor, the five envelopes that are already in evidence, 1-A, 2, 4, 5 and 13.

THE COURT: I see. They are the envelopes to which consumers have already testified they received.

Q Look at the following 33 envelopes marked for identification, they are: Government's Exhibits for identification 3, 6, 7, 10, 11, 12, 14, 16, 18, 19, 20-A and 20-B, 21, 24, 25, 26, 27, 28, 29, 31, 33, 34, 35, 36, 37, 38; 40, 41, 45, 47, 48, 49 and 50.

A Yes.

Q Have you had an opportunity to look at those, Mr. Schroeder?

A Yes, I have.

Q Are you able to determine whether the envelopes that I have just read into the record, marked for identification were envelopes that you prepared and mailed in connection with the $9.95 charges?

MR. RIVERS: Objection as to form.

THE COURT: Overruled.

MR. RIVERS: Exception.

A They appear to be.

Q Would you please tell the ladies and gentlemen of the Jury how the first five that you looked at as well as the 33 that you just looked at appear to be envelopes that you prepared and mailed out in connection with the $9.95 offer?

A The envelopes were envelopes that appeared to be ones that we had in stock in the shipping department --

THE COURT: Were they exactly alike?

"Appear to be," I don't understand what you are talking about. Were they like the ones you have in there?

THE WITNESS: Yes, sir.

THE COURT: In the stock department?

THE WITNESS: Yes, sir.

THE COURT: Go ahead.

fols. (Continued on next page.)

A The labels appear to be the ones that I used on the envelopes.

Q Which labels are you referring to now, sir?

A Both the return address labels and the labels that concern the addressee.

Q How about the Scotch tape, besides the Scotch tape, does that appear to be the same Scotch tape you used at the time?

MR. RIVERS: Objection as to form.

THE COURT: I'll permit it predicated upon the prior testimony. I don't know whether the jury is getting this picture or not. Show one to the jury. Point it out so we know what we're talking about.

What seems to be the same as the ones you sent out?

THE WITNESS: These (indicating). Return -- the address, Foto Factory, Limited, the ones I put on the envelopes and this piece of Scotch tape is what I used to put these addresses, attach them to the envelope.

THE COURT: What about the names?

THE WITNESS: Each individual name I can't remember, sir.

THE COURT: You can't remember it? Are any of

those names on the lists of the defendant corporation?

I'm asking you, Mr. Friedman, as far as you know.

MR. FRIEDMAN: I'm not sure --

THE COURT: Hand me one of those.

(Mr. Friedman complies.)

THE COURT: You have a name here. Leon M. Goodman, 75 Lenox Road, Brooklyn, New York. Is that on the list of customers?

MR. FRIEDMAN: There's no evidence at that time before the jury regarding any such list.

THE COURT: Do you have a list?

MR. FRIEDMAN: Might we approach the bench, your Honor?

(Continued on next page.)

Shb 3

(Sidebar discussion.)

MR. RIVERS: We have a list in evidence, your Honor --

MR. PINCUS: Computer list.

MR. FRIEDMAN: We haven't checked out the computer list.

MR. RIVERS: We have.

MR. FRIEDMAN: You can bring that out on cross-examination.

THE COURT: Wait a minute. Why didn't you check that out?

MR. FRIEDMAN: That list was prepared, our contentions, prepared after the 995 charges were sent out.

THE COURT: Never got the list -- I'm told, gentlemen, we talk too loud.

In other words, you never had the list?

MR. FRIEDMAN: Before the October 24 list was produced by Mr. Rivers. Your Honor, it's our contention that Computer was part of the cover-up, the evidence will show that.

THE COURT: Not a Watergate cover-up?

MR. FRIEDMAN: No.

THE COURT: The U.S. Attorney seized the list?

MR. PINCUS: Wasn't the list shown by Michael Lent and Nick Seminara?

MR. RIVERS: This other list I received from them.

MR. FRIEDMAN: We don't have to give credence to a list notwith respect --

MR. PINCUS: You may be manufacturing the cover-up.

MR. FRIEDMAN: Let the jury decide.

THE COURT: Listen, you may get dogmatic statements. I'm going to decide what you have to do and what you don't have to do. Just relax, Mr. Friedman, and remember the rules of evidence will have to be employed. I don't take your ruling nor his, nor his (indicating). I take mine. Keep that in mind and do the best you can if you're going to prove it.

(The following occurred in open court:)

Q Would you please up one of the envelopes, Government's Exhibit 1-A.

A (Indicating).

Q Again, tell the ladies and gentlemen of the jury how, in what respects, that envelope is the same as the other envelopes you've prepared in connection with the 9.95 charges.

A These envelopes, "Here are your beautiful --" are envelopes which we had in stock, in the Shipping Department. These labels identifying Foto-Factory's address, our labels we had in the Shipping Department that we put on the envelope --

MR. RIVERS: I object on the grounds it's tantamount to putting in evidence. He's talking about an object not in evidence.

MR. FRIEDMAN: Talking about Exhibit 1-A which is in Evidence.

THE COURT: He's talking about that. Maybe, Mr. Witness, you can put the microphone a little further away.

(Witness complies.)

THE COURT: Proceed, please.

A The Scotch tape is what I used to affix these labels to the envelope and I also ran them through a postage meter.

THE COURT: These are all run through a postage meter, are they?

THE WITNESS: Yes, sir.

THE COURT: Have the same Scotch tape?

THE WITNESS: Yes, sir.

THE COURT: Same size envelope?

THE WITNESS: Yes, sir.

THE COURT: Same color envelopes?

THE WITNESS: There are two different colors here.

THE COURT: But they all have Foto-Factory on them, do they?

THE WITNESS: No, some have Foto-Max on them.

THE COURT: What?

THE WITNESS: Foto-Max.

THE COURT: It's all owned by the same company?

THE WITNESS: Yes, sir.

Q Did you use the Foto-Max envelopes as well as the Foto-Factory, Limited envelopes in preparing to mail the 9.95 charges?

A Yes, sir, I did.

MR. FRIEDMAN: At this time I would like to offer into evidence the 33 envelopes that are marked for Identification.

THE COURT: All right, show them to the defense counsel.

MR. FRIEDMAN: They've already seen them, your Honor.

MR. RIVERS: May I have a voir dire?

THE COURT: Yes, up to a point.

VOIR DIRE EXAMINATION

BY MR. RIVERS:

Q Mr. Schroeder, can you say within a degree of definiteness before this jury you prepared each and every one of these 33 envelopes?

A They look like the envelopes that I prepared.

Q Are they exactly the envelopes you prepared?

A That, I can't be sure of.

Q As a matter of fact, there were other persons employed in the shipping unit other than yourself? Is that right?

A Yes.

Q They had the job of preparing envelopes, also; is that correct?

A Yes.

Q In the interim, between Thursday and today, did you have occasion to spend some time in Mr. Friedman's office with Mrs. Schwartz and Mr. Friedman?

A Yes, I did.

Q At that time did you go over the facts that you would discuss from the stand, the similarity or apparent similarity between the labels and these envelopes that you allegedly prepared?

A Yes.

Q Did you go over the fact that you would discuss from the stand the similarity between the envelopes addressed; that is, as to the method you address and the ones you allegedly prepared?

A Yes.

Q Did you go over the fact that you would testify from the stand with regard to the Scotchtape used from the envelopes that you allegedly prepared and those which appear on these 33 exhibits?

A Yes.

Q So that your testimony now is a result of some discussion had with Mr. Friedman and Mrs. Schwartz during the period from Thursday to today?

A Yes.

Q Relative to these envelopes?

A Yes.

Q You cannot say with any degree of definiteness as to whether or not these were the exact envelopes prepared by you; is that correct?

A Yes.

MR. RIVERS: Objection.

MR. PINCUS: I join in the objection, your Honor.

THE COURT: Let me look at them.

(Said exhibits handed to the Court by Mr. Rivers.

THE COURT: The question this morning is your testimony, your own testimony with respect to these new envelopes. What is it, 13, 19, et cetera? That's your --

MR. RIVERS: Might I respectfully except to the Court's question?

THE COURT: Overruled. That's your testimony; isn't it?

THE WITNESS: Yes.

THE COURT: Is it any testimony suggested by Mr. Friedman?

THE WITNESS: No, he asked me.

THE COURT: That's your testimony?

THE WITNESS: (No response.)

THE COURT: All these envelopes do have Foto-Max on them or Foto-Factory, right?

THE WITNESS: Yes.

MR. RIVERS: I respectfully except.

THE COURT: Admitted into evidence.

Next.

MR. RIVERS: May I, for the record, respectfully except.

MR. PINCUS: Exception on my part.

THE COURT: Proceed.

THE CLERK: Government's Exhibit 3, 6, 7, 10, 11, 12, 14, 16, 18, 19, 20-A, 20-B, 21, 24, 25, 26, 27, 28, 29, 31, 33, 34, 35, 36, 37, 39, 40, 41, 45, 47, 48, and 50, envelopes, marked in Evidence.)

(So marked.)

MR. RIVERS: Objection.

THE COURT: No, no, don't keep on objecting.

MR. RIVERS: I excepted. Now, I'm objecting.

THE COURT: That's enough. I ruled on that. There is going to be admitted into evidence. You've got your protection, whatever it is. We can't take that kind of time. Proceed.

DIRECT EXAMINATION

BY MR. FRIEDMAN (Continued):

Q On Friday, did you testify that you had prepared these envelopes as well as several others from the last week of September to the last week of 1973?

THE COURT: Well, he testified definitely, as to certain ones. As to others, his testimony was that it appeared to be the same. There is a difference.

Q When you were preparing the envelopes in connection with the 9.95 charges, were you preparing them on a daily basis?

A Yes, I was.

Q Was it for approximately one month?

A Yes, it was.

Q During that month, what percent of your time was spent on preparing the envelopes for the 9.95 charges?

A That was all the same.

Q All the time?

A Yes.

Q And in September and October of 1973, how many hours did you work there?

A 9 to 5.

Q Would you work five days a week?

A Yes.

Q Prior to the 2.99 and 9.95 mailings, you testified that Government's Exhibit 51 is the order form that you would receive (handing to witness) for the mailing of other packages and envelopes?

A Yes.

Q When you had received that order form, would that order form have the name and address of the customer typed on it?

A Yes.

Q Do you know who prepared those order forms?

THE COURT: I don't know if the jury knows what

you're talking about. I'm not too sure I know. Order Form -- we have two or three days elapsed since the last testimony. What are we talking about here?

MR. FRIEDMAN: The testimony regarding Exhibit 51 in Evidence which is an order form that Foto-Factory LImited had.

THE COURT: You mean sent to others?

MR.FRIEDMAN: They were given --

THE COURT: If you're talking about testimony, not your statement.

MR. FRIEDMAN: Mr. Schroeder's testimony on Thursday was that he would receive the order form in connection with packages and envelopes that he was sending out.

THE COURT: Mr.Schroeder, who did you receive the order form from?

THE WITNESS: There was a separate order department.

THE COURT: Order department. You received it from the order department of your firm?

THE WITNESS: Yes.

Q When you received those order forms, did they have the names and addresses as well as the description of the item to be sent, typed on those forms?

A Yes, they did.

Q Do you know who typed those on those forms?

A It was a computer printout.

Q Prior to the 2.99 and 9.95 mailings, when you would receive a request from the order department to send something out in the mail or by United Parcel or Bank Americard or Master Charges, were involved, what exactly would you receive?

A I would receive two tissue copies. One was to be put in with the merchandise that was being sent to the customer. The other was to be initialed by a packer and dated and retained by the company.

Q Would you receive an order form similar to the Government's Exhibit 51 in Evidence with Master Charge and Bank Americard charges prior to the 2.99 and 9.95 mailings?

A Yes.

Q What would you do with the order form when you had a Master Charge or Bank Americard charge and you were mailing something out prior to the 2.99and 9.95 mailings?

THE COURT: We're talking all the time about 2.99 mail lists. That's really not involved in this case, is it? Is it or isn't it?

MR. FRIEDMAN: I'm attempting to distinguish the procedure before the 2.99 and 9.95.

THE COURT: What does 2.99 have to dowith it?

MR. FRIEDMAN: Might we approach the bench?

THE COURT: Never mind. We don't have time.

Q Are you able to answer the question or would you like it read back?

A I believe you asked me what I would do with the forms that I received.

Q The order forms. We have Bank Americard or Master Card charges involved?

A Yes, a copy went in with the merchandise and a copy was initialed and dated and retained by the company.

(Continued on next page.)

THE COURT: Have you a date there, a date for 2.99 or a date for 9.95?

Q When did you first start preparing the 2.99s?

A The last week in September.

Q Immediately, how long did that last for, the 2.99 mailings?

A About four days.

Q Immediately thereafter, did you start preparing the 2.99 mailings?

A Yes.

THE COURT: That went through September and October or just September?

THE WITNESS: Lasted about a month.

THE COURT: A month.

Q By the whole thing you're talking about the 2.99s and 9.95s altogether?

A Yes.

Q Who gave you your instructions with respect to preparing packages and envelopes for mailings prior to the 2.99 and 9.95 mailings?

A Mr. Seminara.

Q Who gave you the instructions with respect to the 2.99s and 9.95 mailings?

A Dominick Seminara.

Q What percentage of time would you cut --

MR. FRIEDMAN: Withdrawn, I'm sorry.

Q When you were preparing the mailings for the 9.95 charges, what percentage of the time would you use a cutting board to cut out the name and address from the customer copy?

A (No response.)

Q What percentage of the time would you use scissors?

A Well, primarily I used the cutting board all the time and scissors to trim them up.

Q Would you please look at Government's Exhibit 8 in Evidence (handing to witness). It's a Master Charge sales slip form. Would you please show the ladies and gentlemen of the jury where the name and address would appear on the 9.95 customer copy charge slips?

A (Indicating) It would -- the number was generally up here, depending on the type of card it was and the address below it.

Q Would the name be with the address?

THE COURT: Mr. Friedman, are we talking about something that's already in evidence?

MR. FRIEDMAN: Yes, I've indicated Government's Exhibit 8 in Evidence. It's a form, Master Charge,

3-part form. The witness is describing the first part of that form which is entitled --

THE COURT: Well, it's a Master Charge form?

MR. FRIEDMAN: The form used, your Honor, when a merchant is going to prepare a charge for a customer.

THE COURT: This is the form from the bank?

MR. FRIEDMAN: The forms from the bank. The testimony has been --

THE COURT: Never mind.

Q The first copy, which is, Mr. Schroder, is referring to is the buyer's copy (handing to witness). I give you this pencil for purposes of illustration, Mr. Schroeder (handing to witness). Would you please show the ladies and gentlemen of the jury where you would cut along that form when you used the cutting board?

A (Indicating) Made a cut, across here, here and down this way (indicating).

Q Please put an X where the name and address of the customer would appear.

A It would appear here (indicating).

THE COURT: That's a queer way of presenting it to the jury. You should give it to the jury to look at it. In the back row, the jurors can't see.

MR. FRIEDMAN: I'm sorry.

(Mr. Friedman complies with the Court's direction.)

Q Was Mr. Dominick Seminara present from time to time when you were using the cutting board?

A Yes.

Q Was Mr. Stephen Lent present at the time that you were using the cutting board?

A Yes.

Q Where was Mr. Seminara's office?

A On the second floor, in front of the building.

Q And how large an office did Mr. Seminara have? Can you estimate?

A It was a large office.

Q Were there any desks in the office?

A Yes.

Q Do you know how many desks there were in the office?

A Two.

Q Were there any telephones in the office?

A Yes.

Q How many telephones?

A Two.

Q Where was Mr. Stephen Lent's office?

A In that same room.

Q Mr. Schroeder, had you ever seen any advertisements in any newspapers in connection with this 9.95 charge?

A No, I haven't.

Q Have you ever seen any advertisements in any other media in connection with this 9.95 charge?

A No.

Q Would you please look at these four newspaper advertisements, Defendant's Exhibits A, B, C, D (handing to witness).

A is dated October 30, 1973. It's the Daily Journal.

B is dated October 28, 1973. It's the Long Island Press.

C is dated October 30, 1973, and it's the Home News, New Brunswick, New Jersey.

D is dated October 28, 1973 and it's the Hartford Current.

Have you had a chance to look at those four ads, Mr. Schroeder?

A Yes.

Q Have you ever seen those ads before?

A No, I haven't.

Q The first ad is dated October -- two ads are dated October 28, 1973. Two ads are dated October 30, 1973.

Can you approximate -- first of all, do you know the

exact date that you stopped preparing the 9.95 mailings?

A No, I don't.

Q Can you approximate whether the last date that you did prepare the 9.95 mailings was before or after October 28, 1973?

A I know it was in the last week of October.

Q Did you ever receive instructions from anyone to deposit the 9.95 charges in any banks?

A Yes, I did.

Q Who did you receive those instructions from?

A Either from the bookkeeper.

Q What is her name?

A Frances Neiman.

THE COURT: How do you spell it?

THE WITNESS: I don't know, sir.

THE COURT: N-e-i-m-a-n?

THE WITNESS: I believe so, sir.

Q Did you receive instructions from anyone else regarding depositing 9.95 charges into the banks?

A Yes, along with the bookkeeper, Stephen Lent or Dominick Seminara.

Q Do you know how many times you went to the various banks to deposit the 9.95 charges?

A No, I couldn't be certain of that.

Q Did you ever send anybody else to the banks to deposit the 9.95 charges?

A No, I didn't.

Q Did you like working for Mr. Stephen Lent and Mr. Dominick Seminara?

A Yes, I did.

MR. FRIEDMAN: Thank you, I have no further questions.

THE COURT: Can I get the dates corrected? What's the earliest date you have?

MR. FRIEDMAN: Two dates, October 28, 1973, your Honor.

THE COURT: That's the earliest?

MR. FRIEDMAN: Yes, two are dated October 30, 1973.

THE COURT: Thank you.

CROSS-EXAMINATION

BY MR. RIVERS:

Q Mr. Schroeder, the prosecutor asked you from whom did you receive your instructions for the 2.99 offer. You said Dominick Seminara; is that right?

A Right.

Q Dominick Seminara was your employer, was he not?

A Yes, he was.

Q You had received your instructions from Dominick Seminara for everything; is that right?

A Yes.

Q And with regard to the 2.99 offers he was your employer, gave you instructions; is that right?

A Yes.

Q So did Mr. Lent; is that right?

A Yes, he did.

Q He also was your employer; is that right?

A Correct.

Q And with regard to taking the 9.95 offers or credit card slips to the bank, also, in their capacity, as your employer, they gave you instructions; is that right?

A Correct.

Q Anything wrong with that?

A No, sir.

Q You had indicated -- one thing further.

There was a customer list for Foto-Factory Limited; is that right, was there not?

A I don't know what you're referring to.

Q The offers for 2.99 and 9.95 were not made to people in the world at large, were they?

A I don't know --

Q They were major customers, were they not?

A Yes.

Q And the customers were taken from some list of some kind, were they not?

A I don't know.

Q You told us before that you had seen Defendant's Exhibit E before?

THE COURT: What is that? That's the computer list?

On Thursday you say this before?

THE WITNESS: Yes.

(COntinued on next page.)

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CROSS-EXAMINATION

BY MR. RIVERS: (Cont.)

Q If you would turn the page over. Do you find with regard to the Prosecutor's Exhibits 1A, 2, 4, 5, and 13, that the names of those persons appear on that list?

Let me help you. Look up in the corner there and you will see the pages.

A It says 53 Goodman; 159 Sheenan; 309 Esposito; 318 Tom; 87 Roberts.

Q Now, with regard to Exhibits --

MR. FRIEDMAN: Your Honor, may we for the record find out who wrote that in? That wasn't on the exhibit last week.

MR. RIVERS: I wrote it in.

What difference does it make?

Q Turn to the pages.

MR. FRIEDMAN: For that purpose, I have no objection.

THE COURT: I really apologize because I mis the point.

MR. FRIEDMAN: Your Honor, Mr. Schroeder was reading something that was handwritten --

THE COURT: Mr. Rivers, what is this?

MR. RIVERS: What we have done in order to

facilitate things and move forward is to, in the left-hand corner of the exhibit, list the pages, the page numbers on which the persons appear that are corresponding with the exhibits.

THE COURT: All right. Nothing wrong with that.

MR. FRIEDMAN: I hadn't seen it before, your Honor.

THE COURT: All right.

BY MR. RIVERS:

Q Now, we had heard some list, Government's Exhibit 3, 6, 6, 10, 12, 11, 14, 15 -- there are 33 in number; is that right?

A Yes.

Q Do you have any reason to believe, Mr. Schroeder, that if you were to compare these exhibits -- for the time of the Court I won't go through it, but if you want to I will -- with the Exhibits, 33 exhibits and the page numbers, the names of the persons that he wouldn't find to correspond --

THE COURT: Would or would not?

Q Would you or would you not?

A I would have no reason to believe that they don't appear here.

Q Now, the prosecutor had indicated that this was a list made on the 24th of October , 1973.

MR. RIVERS: May I have these marked for identification.

THE CLERK: Defendant's Exhibit F,unbound computer printouts marked for identification.

(So marked.)

xxxx BY MR. RIVERS:

Q I show you Defendant's Exhibit F marked for identification and ask you whether or not you have seen these before in connection with your job at Foto Factory, Inc.?

A I can't specifically say that that's the list I saw.

Q You indicated on Thursday that you saw a list in Dominick's office; is that correct?

A YEs.

Q Do you know whether or not this was the list you saw?

A I can't be certain of that.

Q Well, can you look at it for a moment and see whether or not you see any of the customers on that list that appear in the exhibits?

A I don't think I can pick out the names, Mr. Rivers.

Q At any rate, can you pick out the date?

A This is September 25, 1972.

MR. RIVERS: I can't make an offer at this time, Judge.

Q With regard to the exhibits A through D, the newspaper articles, that is the advertisements, did you have a chance to read them?

A Yes.

Q Do they spell out the entire 995 offer?

A Yes, they do.

Q And they are completely open and in a public newspaper; is that right?

A YEs, they are.

Q At the time that you made these cutouts on this exhibit and pasted them on the envelopes that you mailed, that you indicated looked like the envelopes you mailed, are you familiar with the time Foto Factory Inc. became financially embarassed or on the verge of bankruptcy, when they had a limited amount of funds and so forth?

A What is that?

Q Did there come such a time, as far as you know?

A No, sir, as far as I know.

Q Did there come a time when layoffs took place?

A Yes, there did.

Q In point of time, when was it that you were making these cutouts?

A The layoffs came after I was making the cutouts.

Q Was it closely in proximity, the same time or not the same time?

THE COURT: He said after.

BY MR. RIVERS:

Q But in point of time, how much time after?

A I really don't remember specifically.

Q I see.

Was -- you were in the shipping department, is that right?

A Yes.

Q Did there come a time when Foto Factory's ability to purchase labels and other supplies became curtailed?

A I really don't know that.

Q At any rate, the names that appeared on that exhibit are the names of customers, not the outside public; is that right?

A Yes.

MR. RIVERS: I have no further questions.

CROSS-EXAMINATION

BY MR. PINCUS:

Q Mr. Schoreder, how long did you work for

Foto Factory?

A From April 1973 to November 1973.

Q During that period of time were you completely in charge of the mailroom?

A The shipping department.

Q The shipping department, I'm sorry.

A Yes.

Q Was it a -- did you do a large volume of shipping?

A Yes, I did.

Q What did you ship, can you tell us?

A I shipped film, processing mailers, cameras, flashes. I guess that would cover most of them.

Q In other words, anything that was shipped by the company came through your department or under your supervision?

A Yes, it did.

Q ANd is it a fact that these 995 mailers you've testified to were only a small portion or a small period of time with respect to the overall picture of shipping?

A Yes.

Q Were you the only one in the mailroom?

A No, I wasn't.

Q Did other people ship also?

A Yes.

Q Under your supervision?

A Yes.

Q So that is it fair to say that all of the items in evidence, these mailing envelopes that you have testified to, may not have been sent by you alone, personally?

A That's correct.

Q Did you ever send any free mailers for people who had had a complaint or a problem?

A Yes.

Q How were those sent, I mean, what was the basis for sending a free mailer?

A If somebody said that they had received the film but not the mailers, we would replace them with the appropriate mailers.

Q Did you have a relatively large stock of these mailers?

A Yes.

Q Were they available?

A Yes.

Q Were they kept under lock and key?

A Yes, they were.

Q And who had access to the lock and key?

A I did.

Q And so these had a value and they were taken out only when you intended to use them for some purpose?

A Yes.

Q And on the occasions that you sent free mailers and other material, was that in connection with a complaint that somebody would have made?

A Yes.

THE COURT: Wait a minute.

Just so I know what happened -- I think I do, but I could be rather dense on this mailing business -- would you by your questions bring out just what happens when a complaint is made -- a complaint about what?

MR. FRIEDMAN: Excuse me, your Honor.

Are we talking about the 995s or are we talking about general business practice now?

Can that be made clear?

THE COURT: That's why I don't know.

BY MR. PINCUS:

Q Generally, Mr. Schroeder --

THE COURT: What are we talking about?

MR. PINCUS: I'm talking about both the 995 and the general practice during the time he was there.

I wanted to know from him how he got the

information concerning the fact that he should either send out a replacement or make some kind of refund to someone who had called in on any matter.

THE COURT: But it won't be a 995 matter, would it?

MR. PINCUS: It could be anyone, your Honor.

THE COURT : Would it be a 995 matter? I don't know. I thought the jury might have difficulty in finding out what we are talking about.

MR. PINCUS: Maybe I can clear that up, your Honor.

BY M.R PINCUS:

Q You've already testified that the mailers were kept under lock and key and they were valuable.

A Yes.

THE COURT: Are they 995 mailing lists, is that what you are talking about?

Q Were they all kept in the same place?

A Yes.

Q Are these the ones that were used for both the 995 offer and the 299 offer as well as any others?

A Yes.

Q Were they also used in the general conduct of the business?

A Yes.

Q Aside from any offers, any special offers?

A Right.

Q WEren't they in fact even sold over the counter?

A Yes, they were.

Q Now, there were occasions, were there not, when someone came to you and asked you to issue a credit by way of an additional mailer or several additional mailers?

A Yes, sir.

Q Was that during the entire time that you were employed?

A Yes.

Q In those cases, did you send a mailer or several mailers, whatever the orders to you?

A Yes.

Q And was it a fact, MR. Schroeder, that those orders were given to you with respect to sending other mailer both with regard to the normal conduct of the business prior to the 995 offer, and during the 995 offer?

A Yes.

THE COURT: You wouldn't send one out without investigating the complaint, though?

You don't get a phone call with a complaint

and bingo, out goes the new mailer, it doesn't happen that way, does it?

THE WITNESS: No. But that wasn't my department.

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CROSS-EXAMINATION

BY MR. PINCUS: (Cont'd.)

Q In other words, someone would tell you from another department that you have to issue a mailer or a credit to this one or that one?

A Yes.

Q Was it always the policy of the company to replace mailers or to make provisions for some sort of a refund with reference to someone who is dissatisfied?

A Yes.

Q When you started sending out the $9.95 mailers, did you take them from the same batch that were under lock and key that you had used previously?

A Yes, I did.

Q And these had the same value as any of them that you had sent out before the $9.95 offer?

A Yes, they did.

Q Mr. Schroeder, you had other items that you shipped, didn't you? I believe you testified film, cameras and things like that.

A Yes.

Q Was the company doing, if you know, a large volume of shipping?

A Yes, they were.

Q And could you tell us was the amount of shipping done on the $9.95 offer, was that small in comparison with all of the shipping you did in that business?

A Yes, it was.

Q And did you handle that shipping basically the same as you would handle any other shipping?

A Yes.

Q You had other duties aside from the shipping room, didn't you? Let me clarify. For instance,did you go to the banks to make deposits?

A Yes, I did.

Q Did you go to Kodak to pick up film?

A Yes, I did.

Q Did you take things to the Post Office?

A Yes.

Q Did you pick up merchandise from wholesalers and things like that?

A Yes.

Q So that you weren't always in that shipping room, were you?

A No, I wasn't.

Q Now, let's talk about the deposits. You have talked about slips here, Master Charge and Bank Americard slips. Did you take those slips, the bank copy, to the bank

personally?

A I was handed the deposit, which I made.

Q Did they have some of these slips with them?

A Yes.

Q Did you ever mail any of these slips?

A No, I didn't.

Q So then any deposits you made in the bank were brought personally to the two banks you've already testified to by you?

A Yes.

Q Were you the only one that made the deposits, to your knowledge?

A I don't believe so.

Q I see. Now, there was a customer service department, was there not?

A Yes.

Q Are they the ones that would give you the information regarding refunds or other mailers to people who had made a complaint?

A Yes.

Q Would you say, if you know, that for the volume of business, the complaints were rather small?

A Yes, I would say that.

Q Was it the company's policy to rectify all

complaints?

A Yes, it was.

Q Now, in addition to the newspaper ads that have been talked about today, do you remember any other type of advertising other than newspaper?

A Well, I know that the company did a great deal of advertising, but everything I 'm not --

A Do you recall if there was any advertising on radio?

A Yes, there was.

Q How about television?

A Yes, there was.

Q Were there other publication, magazines?

A Yes.

Q Periodicals?

A Yes.

Q Was it the company policy, if they put an ad in the newspapers, to put a similar ad in these other publications?

A Yes.

Q Did you ever see any of the newspaper ads cut out and hanging on the walls in the office?

A Yes, they were in the order department.

Q As a matter of fact, the company was quite busy, was it not?

A Yes, it was.

Q Did it keep all of your department, yourself and the people under you, busy at all times?

A Yes.

Q You have considerable experience in this line of business, don't you?

A Yes.

Q As a matter of fact, are you not now in the same type of business or a similar type of business?

A Yes.

Q Do you run your present business similar to the way FotoFactory was running initially?

A Well, I don't have a mail order business.

Q I see. Do you sell mailers?

A No, I don't.

Q Do you offer the sale of film together with developing or processing?

A Yes.

THE COURT: You didn't bring out whether he's business for himself or whether he's working for a company.

MR. PINCUS: I intend to go into that.

THE COURT: You just shoot along, but I think we are interested in knowing -- do you have a business

of your own or do you work for somebody else?

THE WITNESS: I have my own business.

Q Is that business a corporation?

A Yes, it is.

Q And could you tell us who the stockholders are?

A Myself and my partner.

Q What is your partner's name?

A Thomas Edwards.

Q I see. And where is your business located?

A In Massapequa Park.

Q And do you do, aside from the fact that you don't send out mailers, do you basically do the same type of business that Foto Factory did, on a smaller scale?

A Yes.

Q When you went to Kodak to pick up film, was it in large quantities?

A Yes, it was.

Q Could you give us an idea. Was it a truckload?

A Truckload.

Q And this film was used not only for sale over the counter but in mailing to customers along with the mailer situation so that they could send back the exposed film for developing?

A Yes.

Q And the developing plant that Foto Factory ran, was it a large one?

A Yes, it was.

Q Was it well equipped?

A Yes.

Q As a matter of fact, wasn't it one of the best ones that you know of?

A Yes, it is.

Q And did it have the latest equipment?

A Yes.

Q How many rolls of films, if you know, was it capable of processing per day at full capacity?

A I would say it was virtually unlimited.

Q Was it running all the time?

A Yes, it was.

Q Were there other offers during the time that you worked there that were given similar to the $9.95 offer, not in the amount of money but a similar type of thing with mailers?

A Not that I know.

Q Didn't you testify to a $2.99 offer?

A That was before I started working.

Q Oh, I see. And this $9.95 offer was sold also over the counter at the Foto Factory, was it not?

In other words, could you come in and buy that $9.95 offer if you saw it in the newspaper?

A Yes.

Q You got along with Mr. Lent and Mr. Seminara, didn't you?

A Yes, I did.

Q And would you say that they were doing the best that they could to run the business?

A Yes.

MR. PINCUS: No further questions.

THE COURT: All right.

Next.

REDIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Mr. Schroeder, would you please look at Defendant's Exhibit E. That is the computer list with the green cover on it. Did you ever see that computer list when you were working at Foto Factory Limited?

A I can't testify to this being the exact list?

Q Does it appear to be the list?

A Yes.

Q Would you please look at Defendant's Exhibit F -- I believe it is in evidence.

A Yes.

MR. FRIEDMAN: I stand corrected; it's identified.

Q During the time that you were preparing these $9.95 mailings? What per cent of your time was spent on the $9.95 mailings?

A All of my time.

Q You testified on direct examination that you prepared $2.95 mailings, is that correct?

THE COURT: $2.95?

Q $2.99. Mailings for $2.99.

A Yes.

Q On cross-examination I believe you told Mr. Pincus that the $2.99 offer, promotion, was on before you were there?

A Yes.

Q Would you please clarify that. When you were working at Foto Factory Limited, were you or were you not preparing a $2.99 mailer?

A Yes, I was.

MR. FRIEDMAN: I have no further questions.

THE COURT: Any more?

Very well. Thank you very much, Mr. Schroeder.

(Witness excused)

MS. SCHWARTZ: Government calls Bernard Tepper.

THE COURT: I think we will have to take a five or ten minute recess, ladies and gentlemen. So we will take about a ten minute recess.

(Jury excused)

(Recess taken)

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(Continued on next page.)

Tepper - direct

(Jury present.)

MS. SCHWARTZ: The Government calls Bernard Tepper.

BERNARD TEPPER, called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

THE CLERK: Full name.

THE WITNESS: Bernard Tepper, 209 Bennett Avenue.

DIRECT EXAMINATION

BY MS. SCHWARTZ:

Q Mr. Tepper, where are you employed at present?

A Eli Reliance One Institutional Services, 56 Pine Street, New York City.

Q What capacity are you employed there?

A Clerk.

Q Have you heard of a company which was known as Foto Factory Ltd.?

A I'm sorry?

Q Are you familiar with a company by the name of Foto Factory Ltd.?

A Yes.

Q Do you recall if you've had business transactions with that company?

A Yes.

Q You have?

A (No response.)

Q You have had?

A Yes.

Q Do you recall approximately the first time you had a transaction with Foto Factory?

A March, '73.

Q Can you tell us what happened at that time?

A Through a friend, I had made a telephone call after seeing ads in the New York Times to the company and I requested films to the extent of about $23.

Q How did you pay for that order?

A Through a Master Charge card.

Q Did you give Foto Factory any information about your Master Charge card at that time you placed your order on the phone?

A Just the name, number, address.

Q Was that your account number?

A Excuse me?

Q Did you give them your account number at that time?

A Account number, yes.

THE COURT: That's the card number, is it?

THE WITNESS: Card number.

Q Did you purchase anything else from Foto Factory?

A No.

Q Did there come a time when you received an envelope in the mail from Foto Factory which is unsolicited?

A Well, it came from Fotomax unsolicited, about October, '73.

Q Did you examine the envelope when it arrived?

A I did.

Q Will you tell us what it contained?

A Four mailers which I assume were free.

Q Did it contain anything else?

A A little slip of paper saying that the value was approximately twenty some odd dollars.

Q Mr. Tepper, I show you now what has been marked as Government Exhibit 12 in Evidence, and ask if you recognize it.

A I do.

Q How do you recognize it?

A Well, the misspelling of my name -- well, I received this in the mailbox, actually.

Q Is that the envelope you received in October of '73 from Foto Factory?

A It is.

Q Could you please examine the contents contained in Exhibit 12 and are those the contents of the envelope when you received it in October of '73?

A Yes, there was one additional one which, after reading this, I thought was free. Igave it to a cousin, it was a movie film mailer which I have no use for.

Q Do you know what happened to that mailer?

A I eventually told him when I received the charge to destroy it because it was trouble.

THE COURT: I don't hear too well.

You eventually told him what?

THE WITNESS: I told him there was something wrong when I received these free mailers being that there was a charge that came a few weeks later from the Master Charge.

I told him not to use it, to destroy it, which he did.

MS. SCHWARTZ: Your Honor, I now ask the envelope and four mailers and -- it's already introduced into evidence.

Withdrawn.

BY MS. SCHWARTZ:

Q Mr. Tepper, at the time you received this envelope which you've just examined, had you ordered these

four mailers from Foto Factory?

A No.

Q You testified that you later received a charge on your Master Charge; is that correct?

A Yes.

Q And do you recall the amount of the charge on your account?

A $23 and change -- I'm sorry, that was the original one. It was $9.95.

Q Did you authorize that charge to be placed on your account?

A No.

Q Did you read the enclosed piece of paper that came with these mailers?

A I did.

Q Did you read it at the time you received these mailers?

A I did.

Q Based on the fact that you had not ordered these mailers and having read the slip, were you able to make a decision as to whether or not you would be charged for these mailers?

MR. RIVERS: Objection, calls for an operation of the witness's mind.

THE COURT: You'll have to rephrase that question, please.

BY MS. SCHWARTZ:

Q Mr. Tepper, I believe you've already testified that you felt that these mailers were free; is that correct?

A Yes.

Q What did you do when you received the charge for $9.95 on your Master Charge account?

A I tried to call the Foto Factory, without success.

Q Was the $9.95 charge for introductory mailers from Foto Factory?

A If I remember correct, that's what it said on the little slip.

Q Is that why you tried to call Foto Factory?

A Yes.

Q Did you do anything else when you received this $9.95 charge?

A Eventually I called the Master Charge company and explained the situation to them.

Q What did you ask them to do, if anything?

A I'm sorry?

Q What did you ask the Master Charge company to do, if anything?

A Well, I mentioned that it was unauthorized and

I think it was a Miss Mailman who requested I return the slip and she would credit the account.

Q Did Miss Mailman arrange for you to receive a credit on your account?

A Yes.

MS. SCHWARTZ: Thank you. No further questions.

CROSS-EXAMINATION

BY MR. RIVERS:

Q Mr. Tepper, were you credited at $9.95 on your Master Charge account?

A I was.

Q Did you have occasion to do business with Foto Factory prior to this time?

A I did.

Q Were you dissatisfied with the speed with which they returned your photos to you?

A I was.

Q Did you do business with them on another occasion and were you dissatisfied, again, with the speed with which they returned your mailing to you?

A I don't follow you.

Q On another occasion, did you do business with them; that is, Foto Factory, and were you dissatisfied --

THE COURT: I don't know whether you're saying

satisfied or dissatisfied.

MR. RIVERS: Dissatisfied.

THE COURT: Dissatisfied.

MR. RIVERS: Dissatisfied.

THE COURT: All right.

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CROSS-EXAMINATION

BY MR. RIVERS:

Q Withe the speed with which your films were returned to you on the second occasion?

A Well, originally, when I first ordered the film, I believe it took several weeks until I received the first mailing back. Then the second time was similar and I received the introductory offer, so-called, before I received the actual second mailing and that was the last time.

Q On the first occasion, when you were dissatisfied, were you instructed it's necessary for you to place fifty cents with the mailing in order to get speedy results?

A Yes.

Q For the purpose of postage?

A It was, but I didn't know this until I had purchased the mailers.

Q But you became aware of that; is that right?

A Yes.

MS. SCHWARTZ: I object on the basis of relevancy.

THE COURT: This is irrelevant. It's irrelevant, hasn't anything to do with direct.

MR. RIVERS: It runs --

THE COURT: It's irrelevant, nothing to do with direct.

MR. RIVERS: Thank you very much.

BY MR. RIVERS:

Q Did you see an advertisement for Foto Factory in the New York Times for the offer?

A I did.

MS. SCWARTZ: Your Honor, may we know which offer he's referring to?

THE COURT: Any offer.

MR. RIVERS: This is cross-examination.

THE COURT: Well, cross-examination has to be relevant.

I see no objection to this question.

MR. RIVERS: Thank you.

MS. SCHWARTZ: I'm not objecting. I want it clarified as to which offers he's referring to.

THE COURT: Give him a chance. Maybe he will bring it out.

BY MR. RIVERS:

Q Did you at sometime complain about the fact that the New York Times, to check persons or companies from whom they receive ads --

A I'm sorry, I can't hear.

THE COURT: Maybe you ought to rephrase it, Mr. Rivers, a little differently.

Q At any rate, you saw an ad inthe New York Times for Foto Factory processing, is that right?

A Correct.

Q You saw an ad in the New York Times with an offer from Foto Factory; is that right?

A Right.

Q With regard to the mailer that you received with this slip of paper in it, did the paper indicate the offer was worth $2.10?

A I believe it did.

Q Did it indicate that your money would be guaranteed back to you or money back guarantee?

A Yes.

Q And you were in fact credited for 995; is that right?

A (No response.)

Q After you made the complaint, you were credited for 995?

A Yes.

Q So you're out of pocket, no money; is that correct, at this point?

A That's a difficult question to answer.

Q At any rate you didn't lose the 995, did you?

A I didn't lose the 995.

Q Yes.

MR. RIVERS: Thank you, Mr. Tepper.

CROSS-EXAMINATION

BY MR. PINCUS:

Q THE COURT: Wait a minute, Mr. Tepper, Mr. Pincus wants to ask you questions.

I hope it's not the same questions.

MR. PINCUS: I'll try not to,your Honor.

BY MR. PINCUS:

Q Mr. Tepper, you say you gave one of the mailers to your cousin; isn't that correct?

A Yes.

Q DId he use that mailer?

A No.

Q When you received the charge of 995, you knew the mailers had a value, isn't that a fact?

A Yes.

Q That's why you asked your cousin to return it to you?

A Destroy it.

Q To destroy it.

Did he destroy it?

A Yes.

Q So that you received four and only had three? Isn't that a fact, three left?

A Right.

Q As a matter of fact, do you know if your cousin actually used the mailer or destroyed it?

A I assume he destroyed it.

Q You assume.

Now, had he used that mailer and not destroyed it, he would have received a value, would he not, by developed pictures or movie film?

A Yes.

Q Nevertheless, your bank or your charge was credited with the 995, isn't that so?

A Yes.

Q So that it's entirely conceivable that you or your cousin received services that were valuable without paying anything for it; isn't that possible?

A Possible.

Q And you never received another charge from Foto Factory for that mailer that you had given to your cousin; did you?

A Possible.

THE COURT: You're talking about possibilities.

Do we have any facts here? I mean this is all speculative.

MR. RIVERS: Your Honor, with all due respect to the Court, all the exhibits put in by the prosecutor were possible identifications.

They also were possible.

THE COURT: No, no, we are not going back to that. What I want to know, is it a fact the cousin used this?

MR. PINCUS: We have no way of knowing, your Honor. That's the question I posed.

THE COURT: We are just guessing.

MR. PINCUS: Yes.

THE COURT: I don't know.

MR. PINCUS: Yes.

THE COURT: That's irrelevant. We are taking time. I don't want possibilities. I'm not interested in speculation. You can ask him whether the cousin used it, whether he used it and didn't pay for it. I think that's relevant, but he doesn't know, so we don't know what happened. I'm not going to permit that before the jury.

It's misleading.

BY MR. PINCUS:

Q You had used mailers with Foto Factory before this, had you not?

A Yes.

Q So you knew that mailers had a value?

A Yes.

Q Mr. Tepper, isn't it a fact you wrote a letter to Foto Factor with a complaint?

A Yes.

Q Did you state in that letter that you were, among other things, concerned about the fact that they had not charged you sales tax on the 995?

A I was.

MR. PINCUS: No further question.

REDIRECT EXAMINATION

BY MS. SCHWARTZ:

Q Mr. Tepper, you testified also on direct, did you not, that after you received the 995 charge you tried to contact Foto Factory about that charge?

A I did.

Q Could you please explain to the members of the jury what efforts you took to contact Foto Factory?

A I don't know which came first but I think, first, were the telephone calls.

Q Approximately how many telephone calls did you

make to Foto Factory?

A Minimum, a dozen.

Q Were they from Manhattan to Foto Factory's offices on Long Island?

A Yes.

Q Long distance phone calls?

MR. PINCUS: Object to the type of phone calls.

MS. SCHWARTZ: Your Honor, he brought out the expense. I believe on cross-examination --

THE COURT: Wait a minute.

I think -- I don't know whether it is or not. I think it would enlighten the jury and the Court whether a phone call from Manhattan to the office of Foto Factory in Long Island is a long distance phone call. I don't know, is it?

Q MR. Tepper, can you tell us whether or not the phone call from Manhattan to Long Island is a long distance phone call?

THE COURT: Not any place in Long Island, to this Foto Factory.

A Actually, it's a long distance phone call but there were no answers, but the expense started with the registered letter.

Q What do you mean when you say there were no answers?

THE COURT: Gentlemen, I'm going to take five seconds --well, I'll have a side bar.

(Side bar discussion.)

THE COURT: I want to talk very quietly about you, Mr. Rivers. You cannot shake your head or make grimaces with respect to testimony of any witness. That goes for Mr. Friedman, Mr. Pincus and Mr. Rivers. I watched it this time and I don't want that. That's wrong. That's all.

A word to the wise is sufficient.

MR. RIVERS: I am sorry, Judge, I didn't realize I was doing it.

(Open court.)

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THE COURT: The offense occurred, when you did what, when you sent a registered mail letter or what?

THE WITNESS: Registered letter to the company with a return receipt, which I received, plus a follow through of letters to a postal inspector's attorney general.

DIRECT EXAMINATION

BY MISS SCHWARTZ:

Q Now, Mr. Tepper, you said that you made perhaps a minimum of a dozen phone calls to Foto Factory?

A Yes.

Q Did you ever get a response from Foto Factory to any one of those calls?

A No.

MR. RIVERS: Objection, your Honor.

MR. PINCUS: He testified that he --

MR. RIVERS: He testified that he got --

MR. PINCUS: There is no indication that he spoke to anyone.

THE COURT: Let him answer the question. Did you get two answers?

THE WITNESS: I did not receive any answer to any of the phone calls.

THE COURT: That is what he says.

MR. PINCUS: I believe he testified --

THE COURT: Let me ask him, do you mean that nobody answered the phone, no one on the other end?

THE WITNESS: No. Either it was busy or no answer.

THE COURT: Busy or no answer. And that is what you say. All right.

Q Mr. Tepper, did you receive a response from Foto Factory through the letter that you sent them?

A Just a return receipt and a registered letter.

Q What did you say in this letter?

MR. RIVERS: I would object to it.

THE COURT: Yes. Why isn't the letter the best evidence?

MISS SCHWARTZ: It's in the possession of Foto Factory, but I do have a xerox copy.

THE COURT: Ask them to produce the original and upon failure of them to do so, offer the copy.

MR. RIVERS: Your Honor, may I object. The U.S. Attorney is testifying it is a new posse sion of Foto Factory.

Does she have evidence to tha effect?

THE COURT: Ask Foto Factory. Have you got it?

MR. RIVERS: I have no letter.

MR. PINCUS: Neither do I, your Honor.

THE COURT: Ask him whether this is a copy of the letter.

MISS SCHWARTZ: May I have this marked for identification?

THE COURT: How did you know it was in the possession of Foto Factory?

MISS SCHWARTZ: He testified that it was return receipt requested, and he did receive the return receipt.

THE COURT: Bring it out then.

THE CLERK: Government's Exhibit 52, two page xerox document dated November 6, 1973.

(So marked.)

Q I show you Government's Exhibit 52 in evidence --

THE CLERK: For identification.

Q -- for identification and ask you --

THE COURT: Wait a minute, what bothers me, Miss Schwartz, did you say this took place in March of 1973, this mail offer?

THE WITNESS: That is when I sent away for the original mailers.

THE COURT: When did you get it? What date did you get it?

THE WITNESS: I am sorry --

THE COURT: You are not talking about the prepaid mailers, are you?

THE WITNESS: Yes.

THE COURT: If it happened in March 1973 and you did not send the letter until November 1973 --

THE WITNESS: No. March was when I placed the original order. I placed the order with Foto Factory and in October when I received the introductory offer.

THE COURT: All right.

Q Mr. Tepper, do you recognize Government's Exhibit 52 for identification?

A I do.

Q Is that a copy of the letter that you sent to Foto Factory?

A I would call it a reduced copy, actually.

THE COURT: A what?

THE WITNESS: Reduced.

THE COURT: What does that mean?

THE WITNESS: Well, the original was this size --

THE COURT: Is it the same wording exactly?

THE WITNESS: It is my writing, yes.

THE COURT: You are talking about the mechanical effects in reducing the original letter to a smaller

piece of paper, is that right?

THE WITNESS: Yes.

THE COURT: Is this the letter that was enclosed in the envelope which was sent registered mail, or a copy of it rather?

THE WITNESS: Yes, sir.

Q Do you know where the original envelope would be? Excuse me, the original letter?

A It was sent to Foto Factory.

Q Did you receive the return receipt requested, signed by postal factory?

A I did.

MISS SCHWARTZ: Your Honor, I offer this in evidence.

MR. RIVERS: Objection, your Honor, there is no return receipt. There must be a return receipt.

MR. PINCUS: They could have served us with a notice to produce --

THE COURT: Just a minute, please. Sit down, Mr. Rivers, please.

Did you receive a return receipt?

THE WITNESS: I did and I still have it.

THE COURT: Where is it?

THE WITNESS: Home.

THE COURT: All right, you bring it in tomorrow.

THE WITNESS: I will.

MR. RIVERS: I have a further objection, your Honor.

THE COURT: What?

MR. RIVERS: Objection on the grounds that the indictment speaks of a period between September 15, 1973 and October 30, 1973, and this gentleman is testifying about something that occurred in March of 1973 --

THE COURT: No. Maybe I am confused. His original order was in March. The introductory offer was in October, 1973. That's what he said.

MR. RIVERS: I didn't understand his testimony to be that.

THE COURT: Yes. All right, gentlemen, we can take this letter into evidence -- show it to the defense counsel, Miss Schwartz.

MR. PINCUS: No objection, in the interests of saving him the time of coming back with the receipt, no objection.

THE CLERK: Government's Exhibit 52 for identification now marked in evidence.

(So marked.)

THE COURT: Proceed.

MR. PINCUS: I would like the records to show, if your Honor please, no objection to this evidence does not mean that we admit having received the original.

THE COURT: You don't have to admit anything. The testimony of the witness is here for the jury to accept or not accept.

He says he had a return receipt given to him and he is willing to produce it tomorrow.

Is that right?

THE WITNESS: Yes, sir.

THE COURT: Proceed, Miss Schwartz.

Q Mr. Tepper, can you tell us briefly what you complained of in this letter, specifically concerning the 999 offer?

THE COURT: If there is objection to that, I will sustain it because the letter speaks for itself.

MISS SCHWARTZ: I will withdraw the question, your Honor.

THE COURT: There is no objection so --

MR. RIVERS: I have no objection to reading the letter, Judge.

THE COURT: Read the letter.

MISS SCHWARTZ: The letter reads as follows:

"Dear Sirs: Several months ago, after seeing processing done by your Lab and seeing the ads in the Sunday, New York Times, I called Foto Factory and placed an order using my Master Charge Card.

"After using the first mailer, I am sorry to say I was quite disappointed both with the quality and the three and one half weeks to have the film returned, even though I did not send in 50 cents as suggested.

"My next mailing to you consisted of two rolls, and in each roll, 50 cents was enclosed. This mailing occurred approximately October 2nd. Two and one half weeks later I received what I thought to be one roll. I was puzzled at the envelope since the return label was not in my printing. I thought to myself that it was a miracle that I received my photos.

"My first name is Tepper, not Tipper, and my house number 209, not 299. I also have very rarely used my apartment number 3.

"Upon opening the envelope I found myself with what I thought were free mailers to compensate for my lost films. The following day, luckily the films arrived with some nonsensical excuse for the delay.

"Last Thursday night, upon returning home, I

received my montly Master Charge Statement. Enclosed was a card from Foto Factory for $9.95. A xerox copy of the charge is on the bottom of page one of this letter also showing a copy of the incorrect spelling of my name and wrong address number.

" My initial order from Foto Factory through Master Charge was in excess of $20 and had long been paid for. I will now start at the top level and proceed down:

1. Your improper mailing of these mailers to me plus the usage of my Master Charge without authorization by me consists of fraud. The method of doing this through the mails makes this a referral to the U.S. Postal Inspectors;

2. Your charge of $9.95 minus the New York State Sales Tax, I think the New York State Tax Commission might be interested;

3. I also think that the State Attorney General's office might be concerned;

4. Also the Master Charge Companys on the way their credit cards are used; and

5. The New York Times for the type of ads they accept from companies.

" I urgently suggest that a credit slip be

issued to me in the amount of $9.95 sent immediately to Master Charge and a slip to me.

"I request that I have this slip no later than November 15th so I may enclose same to Master Charge.

"I would also like to hear from you concerning this matter also by November 15th. I have also called on November 2, 5 and 6, today, approximately 12 to 15 times at 516 6784311 only to receive a busy signal or no answer at all, having at the second or third attempt letting the phone ring 25 times.

"My proper name and address is Bernard Tepper, 209 Bennett Avenue, New York, N.Y. 10040," and it is signed Bernard Tepper.

"P.S. May I suggest reading this letter slowly and again."

Q Mr. Tepper, did you ever receive a response from Foto Factory from this letter?

A No.

MR. RIVERS: Objection, Judge.

THE COURT: Yes, he was asked that before.

Q Did Foto Factory in response to this letter issue you the $9.95 credit card -- credit slip which you requested in this letter?

MR. RIVERS: Objection, your Honor.

THE COURT: That was asked before too, and the answer was no.

MISS SCHWARTZ: No further questions.

(Continued next page.)

RECROSS-EXAMINATION

BY MR. RIVERS:

Q Mr. Tepper, you felt that when you received this mailer originally that was in compensation for lost films; is that correct?

A Until I read the little slip of paper.

Q I see.

Subsequent to reading the little slip of paper, your mind was changed?

A It was.

Q And what was your mind originally?

That it was in compensation, and when your mind changed, you felt it was free; is that correct?

A Yes.

MR. RIVERS: Thank you.

Q And this is after reading the slip of paper?

A I don't follow your trend.

Q When you thought it was free it was after reading the slip of papers; is that right?

A Yes.

Q Which said, "Money back guarantee. Value $22.10," is that right?

A Yes.

CROSS-EXAMINATION

BY MR. PINCUS:

Q You made mention in your letter of having sent back two rolls of film or two orders to be developed prior to the $9.95 offer; is that correct?

A Those are the mails that I had paid for.

Q Now, you stated in your letter that you were dissatisfied with the service with the first mailer that you sent back; isn't that correct?

A Yes.

q How is it then that you didn't send the others back for credit, but instead sent back another mailer with a second roll of film?

A I thought I was -- I had the mailers and I thought that that was it.

Q You knew that --

A I would use them up.

Q You knew they had a value?

A the mailers that I paid for had a value.

MR. PINCUS: Thank you.

MS. SCHWARTZ: No further questions.

THE COURT: Thank you very much, Mr. Tepper.

(Witness excused.)

MS. SCHWARTZ: The Government calls Anthony Obst.

A N T H O N Y K. O B S T , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MS. SCHWARTZ:

Q Mr. Obst, where do you currently reside?

A 375 Riverside Drive, New York, New York.

Q Are you currently employed?

A No, I am not.

Q What are you doing now?

A I recently graduated from law school and I'm studying for the Bar exam.

Q Are you familiar with a company known as Foto Factory Ltd.?

A Yes.

Q Do you recall the first time you heard of Foto Factory?

A Yes, I do.

Q When was that?

A That was about May of 1973.

Q And did you have a business transaction with Foto Factory at that time?

A Yes, I did.

Q What did you order from Foto Factory, if anyth

at that time?

A I ordered four rolls of film.

Q How did you pay for the film?

A I ordered them over the phone from the company and gave them my Master Charge number?

Q Did you give them any other information at that time?

A No, I didn't except for the address that it was to be sent to.

Q And what address was that?

A That was the address of my in-laws in New Jersey.

Q Did there come a time when you received an unsolicited envelope from Foto Factory?

A Yes, there did.

Q Approximately when was that?

A It was approximately October of 1973.

Q And did you examine the envelope when it arrived?

A Yes, I did.

Q By the way, Mr. Obst, where did the envelope arrive?

A It was also sent to my in-laws' address.

Q That was the address which you had previously given Foto Factory?

A Yes, it was.

Q And where were you living at the time that you received this envelope?

A At the time I was living in New York City.

Q Now, what did you see in the envelope when you examined it?

A When I examined it I saw approximately four mail mailers for film and a white slip of paper.

Q What did the white slip of paper contain?

A As I recall, it contained information to the effect that this is your -- these are four free mailers, $22 value.

Q I show you now Government's Exhibit 10 in Evidence and ask you if you recognize it.

A Yes, I do.

Q How do you recognize it?

A By the address on the front and the contents.

Q Can you tell us what that is?

A The address on the front is Anthony K. Obst, 1263 Crimm Road, Sommerville, New Jersey, 00874, and the contents is four mailers and a note.

Q Is this the envelope and contents that you received in October, '73?

A Yes, it appears to be.

Q Had you ordered those four prepaid mailers?

A No, I hadn't.

Q Did you expect to be charged for these mailers?

MR. RIVERS: Objection.

THE COURT: I will permit it.

MR. RIVERS: Exception.

THE COURT: No, not excepted. I am perfectly willing to have him testify what these words meant to him, but what he hopes is another matter.

I will sustain the objection. What is the meaning to you of this white slip?

THE WITNESS: The meaning to me was that these were four free mailers that I was free to use.

Q Did there come a time when you did receive a charge from Foto Factory for these mailers?

A Yes, there did.

Q What was the amount of that charge?

THE COURT: Wait a minute.

Did you ask him whether he actually used these mailers?

Q Mr. Obst, what did you do with the mailers when you received them?

A I put them away.

Q Did you use any of the four mailers?

A No, I didn't.

Q What was the amount of the charge that you received?

A I received a charge through my Master Charge in approximately October of '73 for $9.95.

Q Was that the same Master Charge account that you had previously used to order from Foto Factory?

A Yes, it was.

Q And what did you do when you received that $9.95 charge?

A I didn't recognize it so I wrote to the bank asking for particulars on it, a copy of the charge slip.

Q And did you get a copy of the charge slip?

A Yes, I did.

Q When you received the copy what did you do?

A When I received the copy, I noticed that I hadn't signed it and I hadn't ordered anything and that it had my address from Somerville, my in-laws address on it, so I wrote the company that was indicated on the charge slip asking them why they charged me -- asking them to give me a credit for the charge.

Q What is the company that was indicated on the charge slip?

A It was Fotomax.

Q Did you receive -- did you write to the address on the envelope?

A Yes, I did.

Q Did you receive any reply to your letter?

A No, I didn't.

Q Did you contact Master Charge in reference to this charge?

A Yes, I did.

Q Did you ask them for a credit?

A Yes.

Q Did Master Charge issue a credit?

A Yes, they finally did.

MS.SCHWARTZ: No further questions.

CROSS-EXAMINATION

BY MR. RIVERS:

Q Mr. Obst, when you ordered back in May of 1973, was it by telephone?

A Yes, it was.

Q And at that time, did you give your credit card number?

A Yes.

Q At that time, did you sign a credit card slip?

A No, I didn't.

Q And at the time that you received the charge,

on that occasion, did you get back a credit card slip signed by yourself?

A No, I didn't.

Q So on that occasion there was no signed credit slip; is that correct?

A That's correct.

Q Now, your letters, however, with regard to your complaints, complained of the fact that you had been charged without signing a credit card slip?

A We are talking about two different times now, are we not?

Q A subsequent time with the $9.95 offer, did you complain about having been charged without signing a credit slip?

A I complained about being charged for something I didn't order.

(Continued on next page.)

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CROSS-EXAMINATION

BY MR. RIVERS: (Cont.)

Q I thought it was your testimony on direct examination that you complained about being charged without having signed a credit slip?

A That was one of the particular points I made in the complaint, in the complaining letter.

Q When you made that point in the complaining letter you were in error; is that right?

A No, it was not.

Q You were charged in May of 1973 without having signed a slip for your Master Charge?

A I was never charged, I returned the film in May of 1973 to the company.

Q You returned the film that you originally ordered?

A Yes,because it came too late.

Q You got a credit for it?

A I was never charged for it.

Q The company never charged you for it?

A That's correct.

Q You didn't tell the U. S. Attorney that, though?

A I don't believe she asked me that question.

Q What was the value of what you received back in May of 1973, that you returned?

A I don't recall. It was four rolls of 35 millimeter film.

Q Would it refresh your recollection to tell you that you valued those four rolls at $25.09, including shipping?

A No, it doesn't refresh my memory. That may be correct.

Q Do you recall being asked the question:

"Question: Was it a form or mail order"--

THE COURT: What is that?

MR. RIVERS: "Was it a form" --

THE COURT: Was this before the Grand Jury or what?

MR. RIVERS: I withdraw the question.

Q Mr. Obst, I show you this document and ask whether or not this is your signature?

A Yes, it is.

MR. RIVERS: I have established that.

Q Do you recall being asked the question--

THE COURT: No, but I don't know what he signed. Is this a deposition, what is it?

MR. RIVERS: I believe it is a deposition, Judge, of some kind.

THE COURT: All right. Maybe the U. S. Attorney might explain it.

What is it?

MS. SCHWARTZ: It is a questionnaire that was sent to Mr. Obst, but it is not under oath.

THE COURT: Proceed.

BY MR. RIVERS:

Q Do you recall being asked the question:

"Was it a phone or mail order, and what amount was involved?"

ANd giving the answer: "It was a phone order for a total of $25.09, including shipping and taxes."

A If that's what I put down on the questionnaire, that's correct.

Q Can you tell the Court and jury how you came to the value of this order since in fact as you indicated you never used it, you were never charged and you were never credited?

A I ordered four rolls of film over the phone on a Thursday or Friday. I asked them if it could be delivered by the following Monday or Tuesday since I was leaving overseas for a trip, and that's what I wanted the film for. They indicated yes, they thought it could be.

So when I got ready to leave and it didn't

arrive I left word with my in-laws to return it to the company requesting that I not be charged.

I assume that's what they did.

Q Mr. Obst, do you agree with me that that was not responsive to the question I just asked you?

I asked you how did you come to the value of $25.09 and you gave me a long history of how you were going to travel. I'm asking you how you came to that value since you were not charged, you were not credited?

A THat's correct.

Q Give the jury the answer with regard to how you came to the value of the charge.

A That was the charge that was advertised in the ad I responded to when I ordered the film.

Q That's how you valued, that was the value placed on that by the company; is that right?

A That's correct.

Q You indicated further that this offer you received in the mail, the 995 offer, was free?

A Yes.

Q The slip of paper that you received is -- is the word "free" used on that paper?

A Do you want me to read it and check? I don't recall specifically.

Q Read it and perhaps you can refresh your recollection.

A The word "free" is specifically not used.

Q Is there an amount of money used in connection with this offer?

A "They are worth $22.10," that sentence is there.

Q Is the term "Money back guarantee" used in connection with this offer?

A It's not clear whether it is used in connection with this offer or not. It says "Money back guarantee," at the bottom of the slip.

Q Isn't that the very last thing on the slip, which is underlined "Money back guarantee"?

A It's not underlined. I assumed that that meant if they lost my film, they would replace it.

Q I didn't ask you what you assumed. I asked you, is it there?

A It's there.

Q Mr. Obst, I understood you to say that you had graduated from law school.

A That's correct.

Q How long ago was that?

A May 14, 1975.

Q Did you take a course called "Contracts" in law school?

A Yes, I did.

MR. RIVERS: I have no further questions.

CROSS-EXAMINATION

BY MR. PINCUS:

Q Mr. Obst, you recall when you ordered the first order which you never used, you gave them your charge account number, did you not?

A I did.

Q Did you ever sign a slip?

A No. I didn't.

Q Do you remember sending a letter dated November 25, 1973 to the customer service department of Foto Max in Westbury?

A Yes, I do.

Q And do you remember stating in that letter something to the effect that it was against the law or the Master Charge rules to charge a customer's account without authorization?

A Any sort of authorization? Yes.

Q You wrote the letter?

A Yes.

Q So that when you ordered the first order

you signed nothing?

A That's correct.

Q And in connection withthe second order which you claim you didn't order, you also signed nothing?

A I authorized them over the phone on the first order. The second order I did no sort of authorization.

Q But in both cases, you never signed any slip?

A The first case I gave a verbal authorization and in the second case I gave no --

Q Mr. Obst, as a future attorney --

THE COURT: Please, now, that's not --

MR. FRIEDMAN: Your Honor, he's a witness.

THE COURT: That's all irrelevant, isn't it?

MR. PINCUS: I withdraw it.

THE COURT: You know, Mr. Pincus, --

MR. RIVERS: With all due respect to the Court, if the U. S. Attorney hadn't made a point of asking this gentleman whether or not he was going to school --

THE COURT: We have all that.

MR. RIVERS: That is placing in front of the jury something --

THE COURT: Enough. Objection overruled.

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Q Mr. Obst, did you sign either of the two Master Charge slips personally?

A No.

Q Were you credited on both cases, both the first and second with whatever the charges were?

A The first charge, I don't believe, was ever made so there was not a credit involved. The second charge I was finally credited by the bank.

Q As a matter of fact, you never paid under either of the situations?

A That's correct.

MR. PINCUS: Thank you. No further questions.

REDIRECT EXAMINATION

BY MRS. SCHWARTZ:

Q Mr. Obst, the words "money back guarantee," could you tell us what that meant to you at the time you first read it on that slip?

MR. RIVERS: Objection.

THE COURT: No, I think I'll permit it. We might as well have every word read and understood, or at least the impression it gives to the witness.

A The impression I got from the words "money back guarantee" was that if, when I used the mailer to send the film into the company, if they lost the film they would replace

it for me or if they ruin it in some way they'll replace the film. They did not give me the impression I was being charged for the mailers.

MS. SCHWARTZ: Thank you.

RECROSS-EXAMINATION

BY MR. RIVERS:

Q It didn't say that, though, if you mailed the film and lost the film or the film is lost you would not be charged; it didn't say that, though, did it?

A What does money back guarantee --

Q Did it say that?

THE COURT: Just a minute, please. We're going to carry this on in an orderly way and we're going to have proper questions and we're going to give the witness a chance to answer. It's not a debating society. He can testify as to what his impression is and if you want to, information and other place, forum, to argue that it didn't, he didn't say that, that's up to you. He can testify. You're not on the stand yet.

MR. RIVERS: I'm merely asking the question, did it say that? That's a proper question.

THE COURT: You can akk that question. You asked it and he said no.

MR. RIVERS: I never got an answer, Judge.

THE COURT: Did it say that in so many words?

THE WITNESS: Would you ask the question again, please?

Q Did it say in that slip of paper that if you lost your film or if a company lost the film or if you did not use it you would not be charged?

A Counselor, to me money back guarantee says that.

Q And to me all birds fly. I'm just asking you --

THE COURT: Do you want to get on the stand and testify do all birds fly?

MR. RIVERS: May I ask for a response?

THE COURT: He's given an answer. Next question.

MR. RIVERS: It's not responsive to the question.

THE COURT: It is. Ask him again. See what he says. Ask him.

MR. RIVERS: Might I ask it again, please?

THE COURT: Yes.

Q Did it say that?

A In so many words, no.

Q Thank you.

What does it mean to you when you use "in so many words"?

THE COURT: No, no, no.

MR. RIVERS: I'll withdraw the question.

THE COURT: We're not going to get Webster's Dictionary out here.

MR. RIVERS: I'll withdraw the question.

Q Does it say here clearly in the printed form, separated from the rest of the paragraph, "Money back guarantee"?

A Yes, it does.

Q Does that connote to you that some money was involved somewhere?

A Not necessarily. If I use the mailers and they ruined my film, then they would have to give me my money back for the film that I used in the mailers. That's what it meant to me.

Q Did it say that?

A It says, "money back guarantee." Draw your own conclusions from that. That was my conclusion from those three words.

Q Your conclusion, but it's not printed there in words?

THE COURT: No, I think the jury got your point.

Q How about $22.10, what does that mean to you?

A That means I got something free that was worth $22.10 when charged or otherwise.

Q The word "free," is it contained in that piece of paper?

A The word "free" is not contained, no.

MR. RIVERS: Thank you. No further questions.

THE COURT: Next? Do you have more questions?

MS. SCHWARTZ: No further questions, your Honor.

THE COURT: Thank you very much.

Next witness.

This is a problem, gentlemen. Can we say this to the jury that -- one counsel that I don't want to specify -- who has a doctor's appointment which, of course, under the circumstances the Court must honor and therefore we're going to have, in all events, I think, to stop around 2:30. Is that understood?

Therefore, I thought the plan was to continue until that time or 2:00 o'clock; is that right, Mr. Friedman?

MR. FRIEDMAN: Gentlemen?

THE COURT: You looked at the clock. That's why I made this statement. Bring on your next witness.

MR. FRIEDMAN: Your Honor, our next witness is in the process of arriving. Could we take, maybe, a few minutes' break?

THE COURT: I'm going to sit here until he comes. Very well, ladies and gentlemen, we'll take a few minutes and maybe we can get some coffee up for the jury.

If we can, we'll try. We'll take a few minutes' break. I'll wait.

(Jury leaves courtroom.)

THE COURT: When is the witness coming?

MR. FRIEDMAN: She's coming, in the process of arriving.

THE COURT: We'll take a recess.

(Recess.)

THE COURT: What is the application?

MR. FRIEDMAN: The other witnesses that we were going to call today, your Honor, were going to be coming in at 1:30. We did not know we would not be breaking for lunch.

THE COURT: We have a problem, also, I have to swear an Assistant U.S. Attorney in at a quarter to two; maybe it will only take fifteen minutes. He's a former law clerk. We'll have to stop for that.

What's your application?

MR. FRIEDMAN: I want to call to the Court's attention that we have one witness here and the other witnesses won't be here until some time after 2:15 or 2:30.

THE COURT: They're no good then.

MR. FRIEDMAN: That's correct, your Honor. We

did not know we would not be breaking for lunch today. I'm sorry that we don't have the other witnesses here.

THE COURT: It's a day lost. Your one witness is here?

MR. FRIEDMAN: Yes, sir. She may be on the stand until 2:30 for all I know.

THE COURT: Why would she be on the stand until 2:30? Bring her in. Is she there?

MR. FRIEDMAN: Yes.

THE COURT: Wait a minute. I don't have my law clerk or the deputy courtroom clerk. Who knows where he is?

MR. RIVERS: This witness will be on until 2:30.

COURT: I'll have to take a fifteen minute recess to swear in my law clerk as an Assistant U.S. Attorney; not here, in my chambers.

MR. FRIEDMAN: I was going to call to the Court's attention Mr.Pincus had made an objection to my asking Mr. Schroeder a question. Mr. Pincus indicating if we wanted it we could have submitted a notice to produce to the defendants.

THE COURT: What are you talking about, a letter?

MR. PINCUS: We withdraw an objection. It was admitted into evidence with respect to that letter.

MR. FRIEDMAN: My point, Mr. Stephen Lent has

been served a subpoena to furnish all corporate documents in his possession to the grand jury.

Mr. Pincus --

THE COURT: Grand jury?

MR. FRIEDMAN: Yes, your Honor.

THE COURT: We're not before the grand jury.

MR. FRIEDMAN: No, your Honor, but if they had been --

THE COURT: They have been furnished.

MR. FRIEDMAN: He claims he doesn't have any other documents. Mr. Pincus, by stating that objection to the jury is, I think, misleading the jury. I don't think he did it intentionally, but nonetheless, it's misleading to the jury.

MR. PINCUS: We withdrew our objection. The letter was entered into evidence.

THE COURT: What do you want me to do?

MR. FRIEDMAN: I would ask, your Honor, in the future, if there's any colloquy between the attorneys, including myself with respect to the production of documents to be done at side bar.

THE COURT: I didn't notice any colloquy; simply an objection made. What you're saying is that any subsequent objections along those lines would be untenable and improper; is that what you're saying?

MR. FRIEDMAN: Yes, your Honor.

THE COURT: We'll see. Very well.

They must be through with their coffee by now. Take a look-see, Mr. Law Clerk.

(Law Clerk complies.)

THE CLERK: No, your Honor. They had numbers on the top of them and they're just about halfway through with it, your Honor.

THE COURT: Very well.

(continued next page)

(Jury present.)

MR. FRIEDMAN: May I have this marked for Identification, please?

THE CLERK: Government's Exhibit 53, document, marked for Identification.

(So marked.)

MR. FRIEDMAN: The Government calls Theresa Grillo.

T H E R E S A G R I L L O , called as a witness, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Mrs. Grillo, are you a former employee of Foto-Factory Limited?

A Yes.

Q When did you first start work for Foto-Factory Limited?

A August of 1972.

Q Where was Foto-Factory Limited situated then, where were their offices?

A Westbury, Long Island.

Q How did you get the job?

A My brother.

Q What is his name?

A Nick Massara.

Q Was he one of the owners and managers of Foto-Factory, Limited in 1972?

A Yes.

Q And who else managed and owned Foto-Factory, Limited in 1972?

A Stephen and Michael Lent, Dominick Seminara and Nicholas Massara.

THE COURT: You might think about speaking a little closer to that microphone.

Q Did there come a time when Foto-Factory moved from Westbury to Rockville Centre?

A Yes.

Q When did that take place? approximately?

A April of 1973.

Q In April of 1973 who did you answer to, who was your boss?

A Mr. Seminara and Mr. Stephen Lent.

Q What did Mr. Michael Lent do at Foto-Factory, Limited in April of 1973?

A I don't know.

Q What did Nick Massara do in April of 1973?

A He was in charge of the lab, the processing lab.

Q And what does that mean, what were his duties?

A I don't know. It was on a different floor.

Q Did he process film?

A He was in charge of processing film.

Q And are you presently working with your brother, Nick Massara?

A Yes.

Q Is he in the film processing business today?

A Yes.

Q Back in April of 1973 what did Mr. Seminara do, if you know, in connection with Foto-Factory, Limited, what were his functions?

A In charge of film, selling of film.

THE COURT: In charge of film? What do you mean by that?

THE WITNESS: Mail order film.

THE COURT: I thought your brother was in charge of processing the film.

THE WITNESS: Processing the prints.

THE COURT: Mr. DominickSeminara was in charge of what?

THE WITNESS: Selling the film.

THE COURT: All right.

BY MR. FRIEDMAN:

Q How about Mr. Stephen Lent, what was he doing in April of 1973?

A He was in the same as Mr. Seminara.

Q How about Michael Lent, do you know what he was doing?

A No.

Q I would like to direct your attention to around September 1, 1973. At that time who did you answer to, who was your boss?

A Mr. Lent and Mr. Seminara.

Q Which Mr. Lent?

A Stephen.

Q On what floor were their offices located?

A The second floor.

Q Did they share the same office?

A Yes.

Q Did Mrs. Epstein work on the second floor as well?

A I don't remember if she was there at the time. But later on the switchboard was up on the second floor.

Q Where was your office?

A Two offices away.

THE COURT: Two offices away on the second floor

THE WITNESS: Yes.

THE COURT: Proceed.

THE WITNESS: That's where I was.

Q And do you know Mr. Fred Schroeder?

A Yes.

Q What were his duties in September of 1973?

A Shipping Department.

Q Where was the Shipping Department located?

A Another two offices away.

Q On the second floor?

A Yes.

Q How about Mr. Massara, in September of 1973 where was his laboratory located?

A Downstairs on the first floor.

Q And did Mr. Michael Lent have an office at Foto-Factory, Limited?

A Yes.

Q Where was his office?

A On the first floor.

Q In April of 1973 were you responsible for preparing orders?

A Yes.

Q Were you also responsible for preparing orders in September of 1973?

A Yes.

Q And in April of 1973 who gave you your instructions with respect to preparing orders?

A Mr. Seminara and Mr. Lent.

Q Which Mr. Lent?

A Mr. Stephen Lent.

Q How about in September of 1973?

A They both were my immediate supervisors.

Q I'm sorry?

A They both gave me orders.

Q In connection with the preparation of orders, did you ever receive Government Exhibit 51, which is an order form?

A Did I ever receive it?

Q Did you ever receive copies of it that were filled out?

A Yes.

Q Who prepared these copies?

A A computer.

Q Was the computer at the Foto-Factory, Limited offices?

A No.

Q Did the order have the name and address of the person who the order was going to be sent to on it?

A Yes.

Q Did it have a description of the sale?

A Yes.

Q Between April and September of 1973 what steps would you take with respect to a sale that involved a Bank Americard or Master Charge charge?

A We would fill out a charge form with the customer's order.

Q Would you also receive a computerized copy of the order, which is Government's Exhibit 51?

A Sometimes we did.

Q Would you please look at Government Exhibit 8 and 9, Government Exhibit 8 being a Master Charge sales slip and No. 9 being a Bank Americard charge slip --

THE COURT: Mr. Friedman, I don't want to interfere with the order of witnesses, but I get the impression that order No. 51 comes out of a computer and I don't know who is responsible for that order 51 coming out of a computer. Obviously it does not operate by itself.

I mention that in passing because it seems to me there is a gap there.

MR. FRIEDMAN: Your Honor, there will be testimony with respect to the preparation of the order form.

THE COURT: All right.

Q Mrs. Grillo, are Government's Exhibits 8 and 9

similar to the forms that you would use in preparing Master Charge and Bank Americard charge orders?

A Yes.

Q And who furnished you with these charge forms?

A The bookkeeper.

Q What was her name?

A Frances, I don't remember her last name.

Q Did you have in your office what are known as Master Charge and Bank Americard credit vouchers as well?

A I don't understand what you mean.

Q Are you familiar with the form known as a credit voucher whereby you can prepare a credit for a Bank Americard or Master Charge sale?

A That would be one of these.

Q How would you designate the fact that it was a credit?

A We would get the customer's number.

Q Would you type on there on mark on the Master Charge or Bank Americard that it was a credit?

A Yes.

Q What would you do with the charge slip between April and September of 1973, Bank Americard or Master Charge sales slips, after you filled out the information on it?

A We would bring the hard copy to the bookkeeper

and the other parts to the shipping department.

Q Would the merchannt and the customer copy go to the shipping department?

A Yes.

Q And who gave you all of these instructions?

A I don't remember who gave them to me. Someone told me that's where they went.

Q Who originally informed you of the procedure that you were to follow with respect to Bank Americard and Master Charge charges?

A One of the girls that were working there when I first started the job.

Q Who was that?

A The first name was Liz.

Q Did Mr. Seminara ever give you instructions regarding Bank Americard and Master Charges sales slips between April --

A No.

Q --and September 1973?

A No. When I first started the job in Westbury, they showed me what to do, the girls, and that's how we did it.

Q I am trying to confine your testimony now to April when Foto-Factory first moved to Rockville Centre, to September of 1973, O.K.?

The questions I am asking you now concern that period of time. During that period of time did Mr. Seminara ever inform yc u or instruct you about the Bank Americard and Master Charge charges and the procedure to be followed?

A NO.

Q Did Mr. Stephen Lent?

A No.

Q Did Mr. Nick Massara?

A No.

Q Did Mr. Michael Lent?

A No.

Q Did there come a time in September when you received instructions regarding a $2.99 introductory offer?

A Yes.

Q Who gave you those instructions? How did you first learn about it, I'm sorry, how did you first learn about it?

A It was just tell the girls to -- I don't remember, it was Mr. Seminara or Mr. Lent, I don't remember.

Q And where were you when you were informed about this?

A In the office.

Q Whose office?

A Mr. Lent and Mr. Seminara.

Q The office that they shared together?

A Yes.

Q Were they both present when you were informed about the 2.99 introductory offer?

A Yes.

Q Do you recall which of the two told you about it?

A No.

Q What instructions were you given with respect to the 2.99 introductory offer?

A There was going to be an introductory special for 2.99 and to write them out.

Q What were you to write out and on what?

A The customer's name, address and the account number, andintroductory offer, 2.99.

Q What were you towrite this information out on?

A On the charge slip.

Q On Master Charge slips?

A And Bank Americard.

Q And what information were you informed you would be given to put onto those two charge slips; in other words, what was the source of the information?

A As an introductory offer.

Q Were you informed that you would be given other

documents that would have the names and addresses andthe credit card numbers put onto the new charges, the $2.99?

A Yes.

Q What were you told you would be using?

A The other charge slips.

Q Old charge slips?

A Well, prior sales.

Q Of prior sales. For Bank Americard and Master Charge?

A Yes.

Q Did you in fact start preparing charges for the 2.99 introductory offer on Bank Americard and Master Charge sales slips?

A Yes.

Q And who else worked with you on the 2.99 introductory offer?

A A girl named Ellen.

Q Was it Ellen Camili?

A I don't know her last name.

Q Who else?

A Another woman named Joyce; another girl named Mary.

Q And was there any written statement that you were instructed to put into the preparation of the 2.99

introductory offer?

A Well, there was an introductory offer for 2.99 that was worth more.

Q Was there a written statement that you were told to put into the order, the 2.99 introductory offer?

A Just at the beginning.

THE COURT: Just what?

THE WITNESS: What they were getting in the mail.

Q Were you to put that onto the charge slip?

A A separate form.

Q Who gave you the information to put onto the separate form?

A I don't remember.

Q Well, was it Mr. Lent or Mr. Seminara?

A Either one. I don't remember whether it was Mr. Lent or Mr. Seminara.

Q Were you told this at the same time that they were both in the same office when they first informed you of the 2.99 intfoductory offer?

A I think so. I don't remember.

Q For approximately how many days did you and other employees prepare these 2.99 charges?

A It was only a short time.

Q Can you estimate how many days?

A No.

Q Was it less than a week?

A I think it was less than a week.

THE COURT: You are dropping your voice, Mrs. Grillo.

Less than a months you say?

THE WITNESS: Less than a week.

Q Did there come a time when you were informed that you would now start preparing 9.95 charges?

A Yes.

Q And who told you about this?

A I was in the office and --

Q Which office?

A In Mr. Stephen Lent and Mr. Seminara's office.

Q Were they both present?

A Yes.

Q Was Nick Massara present?

A No.

Q Was Michael Lent present?

A No.

Q Was Michael Lent or was Nick Massara present when you were originally informed about the 2.99 offer?

A No.

Q Did you ever discuss the 2.99 introductory offer with Mr. Michael Lent or Mr. Nick Massara?

A No.

Q How about the 9.95 offer, as far as those two?

A I didn't mention it either.

Q when you were present in Mr. Stepehn Lent and Mr. Dominick Seminara's office when they first informed you that you would be preparing 9.95 charges, what did they tell you to do?

A They they would be -- that the customer would be getting more mailers that were worth more for 9.95.

Q And did they tell you what these 9.95 sales would be based on, these 9.95 charges, what they would be based on?

A On the film mailers.

THE COURT: On what?

THE WITNESS: Film mailers.

THE COURT: Sometimes, Mr. Friedman, the witness drops her voice.

Please keep your voice up.

Q Did Mr. Seminara or Mr. Stephen Lent, when you first received your instructions about 9.95 charges, did they tell you if anybody was ordering the 9.95 mailers?

A No.

Q Did they tell you to continue to use the old charge slips to prepare the 9.95 charges?

A Yes.

MR. PINCUS: I object, your Honor. He is leading the witness.

Why doesn't he just ask her what she was instructed to do.

THE COURT: I think it will expedite the trial if he is permitted to do some leading because this is a question of methodology and he has to know step by step what happened.

I think it will take much longer unless he is given some leeway along these lines. They didn't say anything as to whether or not these people ordered any film, they just said charge them 9.95?

THE WITNESS: No, they said it was an introductory offer.

THE COURT: And 9.95 was what?

THE WITNESS: For film mailers.

THE COURT: And you charged them 9.95 for film mailers, right?

THE WITNESS: Yes.

THE COURT: All right.

Q Mrs. Grillo, I asked you to look at

Government's Exhibit 1B in evidence. It is the written --

MR. FRIEDMAN: Your Honor, it is the written statement that accompanied the envelopes.

Q Would you please read that, Mrs. Grillo?

A Out loud?

Q No, to yourself.

A Oh. Yes?

Q Have you seen that before?

A Yes.

Q Government's Exhibit 1B in evidence?

A Yes.

Q And did you originally prepare that written statement?

A Yes.

(Cont'd on next page.)

Q Would you please explain to the members of the jury the circumstances under which you first prepared that exhibit.

A Well, to enclose these with the mailers and send it to the customer.

THE COURT: You will have to speak a little louder.

Can you hear that?

JUROR 4: Yes.

THE WITNESS: We would put them in with the mailers and send them to the customer.

Q Did you receive instructions to do that?

A Yes.

Q And do you recall who gave you those instructions?

A No.

Q Was it either Mr. Stephen Lent or Mr. Dominick Seminara when you were in their office and they were together?

A Yes.

Q Did you originally take dictation from either one of them regarding the contents of that written statement?

A Yes.

Q Do you recall who gave you dictation on that

written statement before it was put to final form?

A No, I don't remember.

Q Was it either Mr. Stephen Lent or Mr. Dominick Seminara?

MR. PINCUS: Objection, your Honor. She has already answered the question that she doesn't remember.

THE COURT: It is perfectly proper. She doesn't remember exactly, but he is trying to limit it as to one of two, either one.

Q Was it either Mr. Stephen Lent or Mr. Dominick Seminara?

A Yes.

Q Were they both in their office when you took the dictation?

A Yes.

Q And did you take this dictation when they first informed you that there would be a 9.95 introductory offer?

A I don't rememb er.

Q After you received additional instructions from either Mr. Stephen Lent or Mr. Dominick Seminara when they were together in their office, what did you then do with respect to carrying out the instructions?

A I told the girls to type them out on the charge slips --

THE COURT: Will you keep your voice up. He told the girls what?

THE WITNESS: To type them out on the charge slips.

THE COURT: You were in charge of the girls, were you?

THE WITNESS: Yes.

THE COURT: What was your official title?

THE WITNESS: I was just in charge.

THE COURT: Manager?

THE WITNESS: Just in charge.

THE COURT: Proceed.

Q Do you recall when you first started preparing, you and the woman who worked there, started preparing these 9.95 charges?

A Do I recall when?

Q Yes.

A No, I don't.

Q Do you know what month and what year you first started doing these?

A No.

Q Do you remember if it was September of 1973

that you first started preparing these?

A I don't remember the date at all.

Q Where did you get the previous sales slips from in order to make out the new 9.95 charge slips?

A They were on the desk.

Q On whose desk?

A On my desk.

Q Were they in boxes as well?

A Yes.

Q Who gave you the boxes?

A I don't remember.

Q Did Nick Massara give you any boxes?

A Mr. Lent or Mr. Seminara.

Q Which Mr. Lent?

A Stephen Lent.

Q Did Mr. Michael Lent ever give you any boxes?

A No.

Q Did Mr. Massara ever give you any boxes?

A No.

Q Do you recall how many boxes of the previous charge slips you were furnished by either Mr. Stephen Lent or Mr. Dominick Seminara?

A No.

Q Was it more than one?

A I don't remember.

Q Did you ever use a computer list when you were preparing the 9.95 charges?

A No. Even with mailing film, we sent the names to the computer. They didn't send us the name .

Q So with the 9.95 did you ever use a computer list when you were preparing the charges?

A I don't know. Not that I know of.

Q Did you ever use one, Mrs. Grillo?

A The computer list?

Q Yes.

A Only to send out the letters.

Q We will get to the letters in a minute.

Are you referring to letters after the 9.95's were stopped being prepared?

A Yes.

Q The charges?

A Yes.

Q Let's try and stick now to that period of time with you and the other women at Foto Factory Limited, when you were preparing these 9.95 charges.

A Yes.

Q When you were preparing these 9.95 charges, did you ever use a computer list to put the information onto

the new charge slips?

A No.

Q Did you ever furnish a computer list to any of the other women preparing the 9.95 charges?

A No.

Q Did you ever see them using a computer list in preparing the 9.95 charges?

A No.

Q Do you know approximately how many 9.95 charges you and the other women prepared?

A No, I don't.

Q Can you give the jury an estimate?

A I don't remember at all.

Q Do you recall how long a period of time was involved in preparing these 9.95 charges?

A No.

Q Did Mr. Seminara, during the period that you were preparing these 9.95 charges, ever ask you how the 9.95 charges were going?

A Yes.

Q Did Mr. Stephen Lent ever ask you?

A Yes.

Q Did Mr. Nick Massara ever ask you?

A No.

Q Did Mr. Michael Lent ever ask you?

A No.

Q Were more women hired to help preparing these 9.95 charges?

A I don't remember.

Q Did you ever receive a complaint from a person who had been charged 9.95 for the introductory offer?

A Yes.

Q Do you remember when that was?

A When?

Q Yes.

A No.

Q How did you receive a complaint, do you recall?

A Phone call.

(continued next page)

Q Did you answer the phone?

A Yes.

Q What did the customer tell you?

A THat he was charged for mailers that he didn't order and he didn't want them and I called into the office and told Mr. Lent and Mr. Seminara about the customer calling that he didn't order mailers.

Q Which Mr. Lent?

A Stephen Lent and that he says he had given him an immediate and full refund.

Q Did you prepare a refund for that customer?

A Yes.

Q For how long had you been preparing the 9.95 charges before you received this first complaint?

A I don't remember.

Q Did you ask Mr. Lent at that time or Mr. Seminara -- that's Mr. Stephen Lent -- what their error was all about?

A No.

Q Did you continue to prepare the 9.95 charges?

A No.

Q Did you stop?

A Yes.

Q Are you sure of that?

A Well, I stopped and started writing out the credits.

Q For that complaint?

A And the complaint that came in.

Q Was it your testimony, Mrs. Grillo, after you received the first complain, you stopped preparing the other 9.95 charges?

A Yes.

Q Did you tell the other girls to stop?

A I don't know.

Q Did anybody tell you to stop preparing the 9.95 charges?

A I was just writing out credits.

Q After you received the first complain and you informed Mr. Seminara and Mr. Lent about it and they told you to prepare a credit voucher, did they tell you whether you should stop preparing the 9.95 charges?

A I don't remember.

Q Did there come a time when they told you to stop preparing the 9.95 charges?

A I don't remember.

THE COURT: Did they ever tell you to stop?

THE WITNESS: I don't remember.

THE COUET: You stopped?

THE WITNESS: Yes, apparently we did. I don't remember -- that's very confusing, that part --

THE COURT: Time --

THE WITNESS: So many things happened and I don't feel it's necessary to remember.

THE COURT: Necessary?

THE WITNESS: I didn't think at the time that anything was wrong.

THE COURT: But it stopped in all events?

THE WITNESS: Yes.

THE COURT: And it stopped, not of your own accord, but because somebody told you, right?

THE WITNESS: They just stopped.

THE COURT: What?

THE WITNESS: I don't know how we stopped. We stopped.

Q Did anybody tell you to stop preparing the 9.95 charges?

A I don't remember.

Q When you stopped preparing the 9.95 charges, had you used up all of the previous, prior charge slips, that were furnished to you by the other people?

A No.

Q There were still some left?

A Yes.

Q Did you ever ask Mr. Seminara or Mr. Stephen Lent what this error was all about?

A No.

MR. RIVERS: Objection. Your Honor, I don't know why he continues to put the word "error" --

THE COURT: Wait a minute.

MR. FRIEDMAN: I'll withdraw "error", your Honor.

Q Did you ever ask Mr. Stephen Lent or Mr. Dominick Seminara what the 995 charge was all about?

A No.

MR. RIVERS: Also, I object to the use of the word "charge." It's a 9.95 offer. He continues to use the word "charge."

THE COURT: No, no. I think testimony now that you've raised it, the testimony is clear there were charges of 9.95 made.

MR. RIVERS: This lady had to do with the offer, not the charge.

THE COURT: But he just asked, the question, whether she knows anything about it. She's in charge of both these girls and I remember testimony as to Miss Epstein which connected Mrs. Grillo with

the instructions as to what to do. I think the question is perfectly proper.

MR. RIVERS: That's my --

THE COURT: I'm not going to argue. Proceed.

MR. RIVERS: Exception.

Q Mrs. Grillo, is it your testimony you don't remember when you stopped preparing the 9.95 charges?

A I don't remember.

Q Do you remember the month or year that you stopped?

A No.

Q Would you please look at Government's Exhibit 53 for identification (handing).

Have you had a chance to read that?

A Yes.

Q Did you prepare that, the words that are found in that exhibit?

A Yes.

THE COURT: What --

MR. FRIEDMAN: I would like to offer it into evidence.

THE COURT: What is it? Let me see it.

THE CLERK: Government's 53 has not been marked. Only for identification.

(Said document handed to the Court.)

MR. PINCUS: No objection.

MR. RIVERS: No objection.

THE CLERK: Government's Exhibit 53, document from Foto Factory, marked in evidence.

(So marked.)

MR. RIVERS: Might I ask it be read to the jury?

MR. FRIEDMAN: I would like it read after I ask the witness a few more questions.

Q Mrs. Grillo, under what circumstances did you prepare the words that are in Government's Exhibit 53 in evidence?

A Dictated to me.

Q By whom?

A Mr. Seminara.

Q Was Mr. Seminara in his office when this was dictated to you?

A Yes.

Q Was Mr. Stephen Lent also present?

A Yes.

Q Was Mr. Michael Lent present?

A No.

Q Was Mr. Nick Mascara present?

A No.

THE COURT: It's a quarter to 2:00. There is a judicial function I must perfrm in my chambers. I'll be back at 2:00.

We'll have to take a recess. I informed you, gentlemen, of that. And I'm sorry to have these constant interruptions. It bothers me, ladies and gentlemen, but I'm afraid I have to perform this function. We'll take a short recess; 15 minutes.

(Recess.)

BY MR. FRIEDMAN:

Q You identified Government's Exhibit 53 as originally being prepared by you. I want to now ask you where were you and under what circumstances did you originally prepare Government's Exhibit 53.

A (No response.)

Q Had the charges stopped, the 953 charges stopped?

A I don't remember.

Q Did anybody give you the information to put on Government's Exhibit 53?

A Yes.

Q Who was that?

A Mr. SEminara and Mr. Lent in the same office.

Q Do you recall which one gave you the information?

A No.

Q Do you take dictation?

A Longhand.

Q I see. Did you take it down in langhand, dictation they gave you?

A Yes.

Q You don't recall which of the two gave it to you; is that correct?

A No.

Q Did you get part of it from Mr. SEminara and part of it from Mr. Stephen Lent?

A I don't recollect.

Q After you prepared -- well, did you type out the information you took down in longhand?

A Yes.

Q Who did you give it to?

A I put them on the mimeograph.

Q Did you have Mr. SEminara or Mr. Stephen Lent look at this before you did that? In other words, did you type it up in final and let them look at it first?

A I don't remember.

Q Did you make several copies on the mimeograph machine?

A I made a lot of copies.

MR. FRIEDMAN: At this time, I would like to read the letter to the jury.

"Foto Factory LImited, 240 Maple Avenue, Rockville Centre, New York 11570.

"Dear Customer, Recently you may have received a 'special introductory offer' valued at $22.10. We have discovered an error in our computer printout since mailing the offer to you. If you are unable to use the items we would appreciate the return of the merchandise. Please send your account number so we can credit your account promptly. However, if you are waiting for a film order or processed pictures, please specify at the bottom of this letter. A self-addressed envelope is enclosed for your convenience. Very truly yours, Foto Factory Limited."

Q That's the letter that you mimeographed several copies of?

A Yes.

Q What did you then do with the mimeographed copies of the letter?

A We folded them. We had a machine to fold them and we put them in the envelope and had the computer

list with the customers' names on it and put them all in the envelope and sent it to the customers.

Q Was it a small or a large envelope that you used?

A Letter sized.

Q Letter sized envelope.

You recall the month and year that you prepared Government's Exhibit 53 in evidence?

A No.

Q You had a computer list; is that correct?

A Yes.

Q How were the names and addresses put on the envelopes?

A With the label.

Q What kind of label?

A From the computer.

Q Was it a label you peel off a piece of paper?

A Yes.

Q Sticky on the other side?

A Yes.

Q Did you see a computer list when you were doing this?

A Yes.

Q Would you please direct your attention to the

large volumes, the computer list. It's Defendant's Exhibit E in evidence. Take your time and look through there and please tell the ladies and gentlemen of the jury whether that was the computer list that you saw when you were preparing the letters and the envelopes that went out.

A The names were on the label.

Q Did you see any -- did you physically see any computer list?

A There were computer lists prepared, yes.

Q Do you know what the gummed labels, what computer company prepared those gummed labels?

A No, I don't.

THE COURT: Were the gummed labels prepared by a computer?

THE WITNESS: Yes.

MR. FRIEDMAN: That's Mrs. Grillo's testimony.

THE COURT: Gum on them already?

THE WITNESS: They were on like a waxed paper you peel off.

THE COURT: They were printouts, were they? I don't understand it. I must confess I'm not a computer expert.

Q I would like to, for these purposes, I would like to direct your attention to Government's Exhibit 1-A in

in evidence. In the upper right-hand corner is a return address of Foto Factory Limited?

A Yes.

Q Were the addresses that you put on the envelopes that contained a letter, Government's Exhibit 53 have names and addresses similar to this return address?

A Yes.

Q Would the underside of this return address be sticky or gummed?

A Yes.

MR. FRIEDMAN: I would like to show that to the jury, if I may, your Honor?

(A document is handed to the jury by Mr. Friedman.)

MR. FRIEDMAN: May I have this marked for identification, please.

THE CLERK: Government's Exhibit 54, labels, marked for identification.

(So marked.)

Q Mrs. Grillo, I ask you to look at Government's Exhibit 54 for identification (handing). Is that exhibit similar to the gummed labels that you would get in connection to prepare the envelopes for Government's Exhibit 53, the letter?

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(Said document handed to defense counsel by Mr. Friedman.)

MR. FRIEDMAN: Any objec tion? I would like to offer it into evidence at this time, your Honor. I would offer it, your Honor, for the limited purposes of clarity.

THE COURT: For what?

MR. FRIEDMAN: Limited purposes of clarity so the members of the jury will be able to see some blank forms that have the gummed labels on there to be taken off.

MR. PINCUS: We object. We don't see the probative value of this. There's no proof whatsoever where it came from or what it purports to be or what, if any computer company prepared it. It's paper with a lot of stickers on it.

THE COURT: It's not that simple. This lady has testified that that's similar to the stickers she used, both, I think, the name of Foto Factory; is that right?

THE WITNESS: No, no.

THE COURT: Or the name of an addressee?

THE WITNESS: Customer.

THE COURT: Customer, I'm sorry. That's

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similar to the labels you used for that purpose, is that right?

THE WITNESS: Yes.

THE COURT: Yes?

THE WITNESS: Yes, it's sent to the customers to let them know they can have the refund.

THE COURT: There was a customer's name and address?

THE WITNESS: Yes.

THE COURT: Just a type of label?

THE WITNESS: Yes.

THE COURT: As a matter of fact, Mr. Pincus, all you have to do is look at the envelopes already in evidence and compare the labels and you'll see that they are.

MR. PINCUS: Your Honor, also, we don't know --

THE COURT: It doesn't make much difference. It's simply explanatory. Let's not make a Federal project out of it.

(continued next page)

DIRECT EXAMINATION

BY MR. FRIEDMAN: (Cont'd.)

MR. FRIEDMAN: Your Honor, it's being offered for the limited purpose of showing how a gummed sticker would look.

THE COURT: Let me see it first. Let me compare this with the other envelopes where you have gum stickers on it. Do you have one?

MR. FRIEDMAN: The return address is similar on Foto Factory Limited. We are not offering it to show that it's exactly the same type of gummed sticker that was used on the envelopes for the letters.

THE COURT: This is used -- you testified that this was used -- this is similar to the ones used to put the names and addresses of the customer on?

THE WITNESS: Yes.

THE COURT: I don't think it makes any difference whether it's in or out. The jury can see what is in and I think that --

MR. FRIEDMAN: I will withdraw the offer.

THE COURT: If anyone objects to it I will sustain the objection.

BY MR. FRIEDMAN:

Q Mrs. Grillo, at the time that you and the

other women were preparing the $9.95 charges, were you keeping one of the copies of that $9.95 charge slip for the Foto Factory files?

A Yes.

Q And were these copies that you were keeping, were they sent to a computer company to prepare the computerized names and addresses that would go on the letter that was being sent out?

A I don't know.

Q Do you know what the computer list was based on, what the computerized -- withdrawn. Do you know what the source of information was for the computerized address labels that were put on the envelopes in connection with the mimeographed letters?

THE COURT: Did you get these labels that were put on the envelopes -- you saw this one?

THE WITNESS: Yes.

THE COURT: They came across your desk, right?

THE WITNESS: Yes.

THE COURT: Did you put some of them on the envelopes, you and the ladies under you?

THE WITNESS: I put a lot on the envelopes. We sent the letters to almost all the customers.

THE COURT: Did you have to moisten them first?

THE WITNESS: Just peel them.

THE COURT: Peel it off and you put it on?

THE WITNESS: Yes.

THE COURT: Who gave them to you?

THE WITNESS: I don't remember.

THE COURT: You don't remember where you got them?

THE WITNESS: No.

THE COURT: You mean -- how long did you put these on envelopes?

THE WITNESS: I put them on a lot of envelopes, but --

THE COURT: You don't know where you got them from?

THE WITNESS: I don't remember.

THE COURT: All right.

BY MR. FRIEDMAN:

Q Mrs. Grillo, you previously testified that order forms that would have information prepared by a computer were used by you prior to the $2.99 and $9.95 introductory offers, is that correct?

A Yes.

Q Now, I'm directing your attention now to prior to $2.99 and $9.95 offers, would you and other employees

receive mail and phone orders for various items such as cameras or film?

A Yes.

Q And when you would receive these orders, as well as the other employees of Foto Factory for cameras and film, would you prepare any information with respect to those orders that would ultimately wind up on that order form?

A Yes.

Q And what would you put the information down on when you would receive an order for film, for a camera or other photographic accessories?

A The customer wrote in, we would send the order form that they sent in.

Q Where would you send these?

A To the computer.

Q To the computer company?

A Yes.

Q And would you get back copies of Government Exhibit 51, which would contain a description of the sale and the name and address of the person who ordered this?

A Yes.

THE COURT: I'm not too sure that this is clear to the jury, because it's not too clear to me.

Mrs. Grillo, you got orders over the phone,

was it for cameras or film?

THE WITNESS: Over the phone and by mail.

THE COURT: By mail?

THE WITNESS: Yes.

THE COURT: And when you got those orders, let's say, over the phone, would you write something down?

THE WITNESS: We would write them on the charge slip.

THE COURT: On a charge slip?

THE WITNESS: Yes.

THE COURT: Is that one of these charge slips you have identified?

THE WITNESS: Like Bank Americard or Master Charge.

THE COURT: You would write that --

THE WITNESS: Right on that.

THE COURT: -- on the charge slip, then you would send that information to a computer company, would you?

THE WITNESS: Yes.

THE COURT: And what would the computer company do with it?

THE WITNESS: They would put it on a list.

THE COURT: Put it on that list of orders, that would be?

THE WITNESS: Yes.

THE COURT: What is the next step? Would the order go out?

THE WITNESS: Then the customer copy would go to the shipping department and they would send the film.

THE COURT: And they would send the film out, that is the customer copy of the original order you wrote out on that slip, is that right?

THE WITNESS. Yes.

THE COURT: But the computer write-up would stay the same, just to indicate an order, right?

THE WITNESS: No, we would use this part of the sales check -- if you moisten it it would stick.

THE COURT: You had already written something out on that slip?

THE WITNESS: The computer would write on this.

THE COURT: Oh, now I see. It would come back?

THE WITNESS: Yes.

BY MR. FRIEDMAN:

Q Then would you use the order form that came back from the computer company to further prepare the

respective packages or envelopes?

A Yes.

THE COURT: That's where that form comes from, the computer company?

THE WITNESS: Yes.

THE COURT: From information you originally gave to the computer company?

THE WITNESS: That's right.

THE COURT: That's all I wanted to know. Now I understand it. But I didn't before.

BY MR. FRIEDMAN:

Q Was this order form, Government's Exhibit 51, I believe, in evidence, was that used in connection with the $9.95 charges?

A This form?

Q Yes.

A No.

Q Would you please look at Government's Exhibits 1-H and 1-G already in evidence, they are bank copies of Master Charge and Bank Americard. Are those two bank copies similar to the hard copies or bank copies that you and the other women under your direction prepared in connection with the $9.95 charges?

A Yes.

Q Mrs. Grillo, when you were working at Foto Factory Limited and during the time that Mr. Steven Lent and Mr. Dominick Seminara were your superiors, did you always follow instructions?

A Yes.

Q Would you ask questions with respect to the instructions that you got?

A No.

MR. FRIEDMAN: I have no further questions.

CROSS-EXAMINATION

BY MR. PINCUS:

Q Now, Mrs. Grillo, with respect to the $9.95 offer, did you think that was at all unusual?

A No.

Q Had there been other similar offers prior?

A No.

Q Well, was this the -- with respect to the $9.95 offer, was that the normal way that the business was transacted, sending out an offer?

A No.

Q But yet you never thought there was anything unusual about the offer?

A No.

Q Did you ever see the advertising in connection with this offer in the newspapers?

A No.

Q Did you ever hear it on the radio?

A No.

Q How about on the television?

A No.

Q When you first got a complaint, what were your instructions?

A To give the customer the immediate refund.

Q And was everyone who complained given a refund?

A Yes.

Q Was this true during the entire course of the time you worked there?

A Yes.

Q In other words, aside from the $9.95 offer, if there was ever a complaint was a credit issued?

A I didn't work in the customer service department, but I'm sure that's the way it worked.

Q Do you know if this was a large business or if it did a large volume of business?

A Yes.

Q During all the time -- incidentally, how long did you work for the company?

A About a year and a half, I think.

Q And all during that time, was the situation that

you discussed here the normal process of doing business with respect to credits and so on?

A Yes.

Q In other words --

MR. FRIEDMAN: Your Honor, what does the "so forth" mean?

THE COURT: I'm not sure what you mean by "so forth".

Q In other words, what I'm trying to ask you is, did you think there was anything unusual about the $9.95 offer?

THE COURT: Of course the question is not what she thinks but whether it was unusual.

MR. PINCUS: Thank you, your Honor.

THE COURT: If you rephrase it, she can testify.

Q Was there anything unusual with respect to the $9.95 offer?

A I didn't think so.

THE COURT: All right.

MR. PINCUS: No further questions.

CROSS-EXAMINATION

BY MR. RIVERS:

MR. RIVERS: I wasn't going to ask any questions at all, but I will ask it.

Q Mrs. Grillo, were you instructed during the period of time while you were employed at Foto Factory Limited to keep the phone off the hook?

A No.

Q As a matter of fact, were the phones diligently answered?

A Yes.

Q Were you, in fact, instructed to service everyone who complained?

A Yes.

MR. RIVERS: I have no further questions.

REDIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Mrs. Grillo, how many refunds did you prepare or instruct other employees to prepare in connection with the $9.95 charges?

A I don't remember the amount.

Q Was it more than ten?

A Oh, yes.

Q Was it more than a hundred?

A I don't know.

MR. FRIEDMAN: Thank you. No further questions, your Honor.

THE COURT: All right.

Thank you very much.

(Witness excused)

THE COURT: Have you a short witness? I don't mean in stature, I mean in point of time.

MR. FRIEDMAN: No, your Honor. we don't.

THE COURT: I think we ought to stop. I am perfectly willing to stay, it's up to you gentlemen. I have all afternoon until 6:30. Do you have another witness around?

MR. FRIEDMAN: They are around, your Honor, but they are not here.

THE COURT: That decision is easy. We have to stop, don't we? Very well. What about tomorrow? No applications will be heard tomorrow morning. We will start promptly at 10:00 o'clock.

So, ladies and gentlemen, please don't discuss this case among yourselves during the interim or certainly not with anyone else.

As I said, for medical reasons we have to adjourn now. Thank you very much.

(Whereupon the trial was continued to July 1st, 1975 at 10:00 a.m.)

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
FREDERICK SCHROEDER	468	491	510	
BERNARD TEPPER	513	520	526	539
ANTHONY K. OESY	541	546	555	556
THERESA GRILLO	564	609	612	

E X H I B I T S

GOVERNMENT'S		FOR ID	IN EV
3500-20/24	Document dated 10/30/73	445	
3, 7,10,11,12,14,16, 18,19.20A,20B,21,24, 25,26,27,28,29,31,33, 34,35,36,37, 39,40, 41,45,47,48,50.			480
52	Two-age document 11/6/73	531	
53	Document	592	593
54	Document	599	
DEFENDANT'S	Unbound computer printouts	496	

* * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- : 74-CR-765

STEPHEN LENT and
DOMINICK SEMINARA, :

Defendants. :

----------x

United States Courthouse
Brooklyn, New York

July 7, 1975
10:00 o'clock A.M.

B e f o r e :

HONORABLE JOHN R. BARTELS, U.S.D.J.

JOSEPH BARBELLA
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: HAROLD FRIEDMAN, ESQ.
-and-
CHERYL SCHWARTZ, ESQ.
Assistant U.S. Attorney

ALBERT R. PINCUS, ESQ.
Attorney for Defendant Lent

ROBERT RIVERS, ESQ.
-and-
MICHAEL STEVENS, ESQ.
Attorneys for Defendant SEminara

(The following took place in the absence of the jury:)

THE COURT: All right, gentlemen.

MR. FRIEDMAN: Good morning, your Honor.

THE COURT: Good morning.

MR. BIERMAN: Your Honor, in the matter on trial before you, I have an application.

THE COURT: In this case?

MR. BIERMAN: Yes.

THE COURT: What is your position here?

MR. BIERMAN: Well, I represent Mr. Brown, who is --

THE COURT: In this particular case?

MR. BIERMAN: Yes. My name is Stanley Bierman. He was a witness who was served a subpoena -- that is, purportedly served a subpoena. He's been out of the country and was out at the time.

THE COURT: Who served him with a subpoena?

MR. PINCUS: I did.

MR. BIERMAN: I have spoken to Mr. Pincus about this.

MR. PINCUS: We didn't know he was out of the country.

He was the attorney who handled the bankruptcy.

MR. FRIEDMAN: I see.

MR. BIERMAN: I just wanted the record to note that.

THE COURT: All right. Now, what else.

Bring in the jury.

MR. FRIEDMAN: Your Honor, I have a legal application to make.

THE COURT: I am tired of applications every morning. You ought to have done that a long time ago. Why should there be applications every time I want to try the case?

Now, what is it?

MR. FRIEDMAN: There were 12 photostatic copies of envelopes that we attempted to get in through Mr. Schroeder. And under the new rules of evidence which went into effect July 1, those copies can go in if there is no issue with respect to the genuineness. And Mr. Schroeder testified that those copies look like the originals. If we didn't get it in through Mr. Schroeder, then we would have to call 12 people who are spread across the United States and it would take up more time of the Court. I don't think there is any question as to the genuineness of those duplicates being fair and accurate representations of the originals.

THE COURT: Did you ask him those questions when

he was on the stand?

MR. FRIEDMAN: Yes, sir. I asked him if they -- if the Xeroxes as well as the originals appear on the --

THE COURT: Yes, I think you are right. Yes. I think that's true.

Any objection?

MR. PINCUS: In the face of the new rules, your Honor, if that is the new rule --

THE COURT: Yes. We will show you the new rules. Show it to him.

MR. FRIEDMAN: I direct Mr. Pincus' attention to Article 10 of the new rules and the sections thereunder. The definition as well as the -- this is 1002 and 1003.

THE COURT: All right. Now, gentlemen, I have an application to make. It is a reverse application.

Is the jury here?

THE CLERK: I don't believe they are.

THE COURT: All right.

THE CLERK: There are two two jurors missing.

THE COURT: All right. Gentlemen, I have a case I must try on Wednesday of this week. It's a civil case. It will take one and a quarter days or one and a half days or maybe only one day. It was put down -- I don't know -- six months ago. The plaintiff is coming from Finland. There are several witnesses

coming from Finland. There are several witnesses from Finland. And fundamental justice requires that I interrupt this trial and take that one day off.

And the next day I shall be with the 20th Century Fund all day on the issue called Fair Trial, Free Press.

This is very unfortunate and delays the trial. But we will start again on Friday. I will not take any Friday off because of motions. So it will be Monday, Tuesday and Friday.

All right. Now, is the jury ready?

THE CLERK: There are two missing.

THE COURT: All right.

MR. RIVERS: Your Honor, I understand that you said in the beginning that you were going on vacation on the --

THE COURT: No, not until this case is over.

MR. RIVERS: Because if we didn't work for those two days, I just wanted you to --

THE COURT: No. I have to try this case. I am only very sad that I have to take these two days off.

THE CLERK: Your Honor, the jury is ready.

THE COURT: All right, bring them in.

MR. FRIEDMAN: Your Honor, Mrs. Schwartz is not with us. She has laryngitis.

THE COURT: Well, I'm sorry.

(Whereupon, the jury entered the courtroom.)

THE COURT: Ladies and gentlemen, I have a certain amount of bad news in the sense that on Wednesday I must try a civil case that was put down over six months ago and there are witnesses coming in from Finland. Consequently, I just can't disappoint them. However, that will only take one day. But the following day the Court has to devote its time to another project involving fair trial, free press. So we will adjourn until Friday. So the days of the trial this week will be Monday, Tuesday and Friday.

Now, I regret that. I'd rather have tried this through. But I can't escape either of those obligations. It would be unfair to try to make these people from Finland wait around.

Very well. Let's proceed.

Who is the witness?

MR. FRIEDMAN: Mr. Kraics I believe was being cross-examined.

THE COURT: All right.

F R E D E R I C K J . K R A I C S , having been previously duly sworn, testified further as follows:

THE CLERK: The witness is reminded that he is still under oath.

CROSS-EXAMINATION

BY MR. RIVERS:

THE COURT: As I understand it, you are an officer of the National Bank of North America?

THE WITNESS: Yes, that's correct.

THE COURT: All right.

Q There have been two references to date by Mr. London from Control with regard to Exhibits 59 and 65 mentioning November 6th, but he indicated in addition a November 5th date. Are you certain that you saw Exhibit 65 and 59 at the Foto Factory, Limited on the 5th of November?

A Yes, I am sure I saw two printouts.

Q Are you certain that these were the printouts you saw?

A Similar printouts.

Q Similar. Are you certain that these are the exact printouts you saw on that date?

A Well, they are similar.

Q Did you review them or mark them to be certain?

A No.

Q So as far as you are concerned these were printouts that appear similar in nature, but you are not sure that these are the exact printouts?

A They do look similar.

Q Now, Mr. Kraics, with regard to Government Exhibit 67, that's a contract between the Bank of Americard and Foto-Factory, Limited? Now, is there a book or ledger or rule book or something that goes along with that that the bank is --

A Operating guide.

Q Do you have a copy of that with you?

A No, I do not.

Q Is the operating guide part and parcel of the contract?

A There are rules contained therein that would be --

Q Part of that contract which is before you, right? Is that correct? Would that operating guide be part of the contract which is before you? In other words, could one use the contract without the operating guide?

A Yes, one could.

(Continued on next page.)

Q So that you don't really have to operate within the operating guide to operate under that contract with your Bank Americard?

A No. You would have to operate within the operating guide.

Q So that you have --

THE COURT: You would or would not? You would have to operate within the operating guide or not.

THE WITNESS: Yes, you would.

THE COURT: You would.

Q Do you have an operating guide?

A Yes.

Q Was an operating guide issued with that contract to Foto Factory, Limited?

A One would have been sent to them.

Q Do you have it with you?

A No, I do not.

Q I asked you that question because the previous witness made a point to -- with regard to Chase Manhattan and with regard to the other bank, the First National City, to read the operating guide -- and these were placed in evidence. I believe they are Exhibits 66 with regard to Bank Americard and 58 with regard to Master Charge -- and within these operating guides, he indicated that they placed the floor

limit on mail order business. Do you know anything about that?

A I only know of our contract on our -- our operating contract guide.

Q What does your contract say about mail order business?

A It's -- actually, we have a contract which is an addendum to this.

Q I am not talking about a contract which is an addendum. I am talking about a book -- an operating guide. What does your operating guide say with regard to mail order business if anything?

MR. FRIEDMAN: Does Mr. Kraics have to establish whether mail orders are allowed under the contract that they had with Foto-Factory?

Q What does it say?

THE COURT: Where is the contract? All we have to do is look at the contract. It speaks for itself. Where is it?

MR. RIVERS: The contract is before him.

THE COURT: Doesn't it speak for itself? You don't need him.

MR. RIVERS: I understand that, your Honor. But I believe -- I believe the testimony was, if you recall, with regard to the Chase Manhattan Bank, it was

no limit. I mean no mail orders.

THE COURT: That's right.

MR. RIVERS: Zero limit and so forth and so on. We have to have something like with regard to the National Bank of North America.

THE COURT: Well, assuming it is not in the contract itself.

Q Does the contract say anything about floor limit? Your contract before you?

A I have not read the --

Q Well, read it. Take your time and read it over.

THE COURT: Anyway, if an operating guide is pertinent, why can't we get a copy?

MR. RIVERS: I should think we have one. We have with everybody else.

MR. FRIEDMAN: Can we first have Mr. Kraics establish whether Foto Factory was authorized to do mail order business?

MR. RIVERS: May I conduct my cross-examination? That is a question for the redirect examination.

THE COURT: No. Well --

MR. RIVERS: I am merely asking him to read the contract.

THE COURT: Well, if no one will read the

contract, I will read it.

Well, it says here on page -- on paragraph 3, rather, that the bank will from time to time establish and inform the seller of a dollar limitation floor limit upon the total amount of any single card purchased by the seller. That's all I see on floor limit. I don't see any specific reference to mail orders here.

MR. RIVERS: Yes, I understand that.

THE COURT: Do you?

MR. RIVERS: I understand. I read the contract.

THE COURT: You didn't see any.

MR. RIVERS: But that is not my point. My point is that with regard to testifying for Chase Manhattan Bank we were shown --

THE COURT: I know. But he's not here on the Chase Manhattan.

MR. RIVERS: We are doing the same thing with the Bank Americard.

THE COURT: No, no. You asked him about the guide book and you limit yourself to his facts. I think we can find out whether there is an operating guide and whether there is a limit. And whether he knows if it is an operating guide, we will get it.

MR. RIVERS: Yes, your Honor.

Q Is there a floor limit indicated in that contract?

A No. There is nothing.

THE COURT: Wait a minute. Mr. Rivers, there is a floor limit. You ask, is there a floor limit in that contract.

MR. RIVERS: An amount of -- a floor limit indicated in that contract.

THE COURT: No, there is not. I read it.

MR. RIVERS: Thank you very much, Judge.

Q Now, do you have an operating guide, Mr. Kraics?

A Yes. The --

Q Is the operating guide part of the contract?

A No. It is a contract. But no, it is not part of a --

Q It does not have to be read with the contract, right?

A That's correct.

Q Did Foto Factory, Limited have a floor limit?

A Yes, they did.

Q What was that floor limit?

A $50.

THE COURT: What?

THE WITNESS: $50.

MR. FRIEDMAN: Can we have a declaration of --

THE COURT: I don't know what he is --

MR. RIVERS: He said --

THE COURT: Did it have a floor limit?

THE WITNESS: Yes.

THE COURT: How much?

THE WITNESS: It would have been $50.

THE COURT: It was $50.

MR. FRIEDMAN: Floor limit as to retail or --

MR. RIVERS: May I ask the questions?

THE COURT: Wait a minute. This is all much to do about nothing. We are trying to find out what the truth is.

Ask him if there is a floor limit of $50. That's what he said. You find out whether it applies to mail orders or phone orders. You can ask him on redirect.

MR. FRIEDMAN: All right.

MR. RIVERS: Thank you very much.

Q Now, Mr. Kraics, you indicated that -- I think you were shown this Exhibit 53 in Evidence.

THE COURT: I would like to interrupt you again. How does he know it's $50? It is not in the contract.

MR. RIVERS: Certainly not. Like the other contracts where it says 50 on its face and then it was 35.

THE COURT: How do you know it's $50?

THE WITNESS: $50 is our standard floor limit.

THE COURT: For all --

THE WITNESS: For all merchants unless otherwise directed.

THE COURT: All right. Very well.

THE WITNESS: That is on retail sales only.

Q That is what?

A On retail sales.

Q O.K. Let's talk about mail orders. Tell me what the limit is or was on mail orders.

A Mail orders are $15.

Q $15. Not $10?

A No. 15.

Q Where do we find the $15?

A It would be in the contract that we would have with an addendum to this contract.

Q Do you have the addendum?

A No. There was no addendum ever created.

Q So how was the $15 limit established?

A The $15 limit was not established for Foto Fac-

tory.

Q Was not established.

A No. Because there was no contract for mail orders.

Q I see. Do you recall testifying before the Grand Jury on November 22, 1974?

A Yes, I do.

Q Do you recall being asked this question:

"Question: Is there any requirement for mail orders regarding the maximum limit that --"

And you giving the answer, "No."

MR. FRIEDMAN: What page?

MR. RIVERS: That would be page 6 and 7.

THE WITNESS: Could you repeat that, please.

Q Do you recall the question being asked:

"Question: Is there any requirement for mail orders regarding the maximum limit that --"

And giving the answer:

"No."

A No, I do not recall saying that.

Q If you had said that before the Grand Jury --

MR. FRIEDMAN: I have to object now. The question that was asked was not completed.

THE COURT: Let me see it.

MR. RIVERS: Your Honor, I will take exception to that. I have completed the question and answer.

THE COURT: You can take exception. This Court is here and I have a right to see it.

MR. RIVERS: Not about your seeing it, Judge, but his saying that it is not a complete --

THE COURT: What page?

MR. RIVERS: The bottom of page 6 and the top of page 7.

THE COURT: "Is there any requirement for mail orders regarding the maximum limit that --"

Then there is a dash.

MR. RIVERS: Is it complete or is it not?

THE COURT: What?

MR. RIVERS: Is it complete or not?

THE COURT: Doesn't look like the question was completed. There is a dash there.

MR. FRIEDMAN: I believe --

MR. RIVERS: "Is there any requirement for mail orders regarding the maximum limit that --"

And then there are two dashes, and the answer is, "No".

THE COURT: Well --

MR. FRIEDMAN: The question continues after

the "No."

MR. RIVERS: I don't have to read all of the questions or another question. I don't have to read the complete -- another question. I can read another question. But I don't have to read the other questions.

THE COURT: No. Mr. Rivers, we want to get this trial done fast. Now, you don't have to read it. But the other side can read the rest. And we are anxious to get the whole picture here. Now, we don't stop this way. He can --

MR. RIVERS: I didn't stop.

THE COURT: I don't care whether you stop or --

MR. RIVERS: I did not stop. I read the --

THE COURT: The trouble with this is that then he gets redirect and he can ask the same question.

MR. RIVERS: All right. The next question is:

"Question: That the customer can charge for without the merchants calling up Bank Americard for authorization.

"Answer: Yes, the limit would be $15.

"Question: What is the retail limit?

"Answer: The retail limit would be $15. The normal retail limit is $50 on other purchases."

Those are different questions and different answers. I just read them.

THE COURT: No. There is not -- Now, if you want the jury to look at the Grand Jury minutes, let them look at it.

MR. FRIEDMAN: I ask that they look at an unmarked copy. I believe --

MR. RIVERS: May I ask that they look at the copy I have. I have nothing marked here except pen and underlines.

MR. FRIEDMAN: Mr. Rivers was furnished a copy by the Government. I think a clean copy would --

MR. RIVERS: What difference could it make. We are wasting time.

THE COURT: It doesn't make a bit of difference. But we can't waste time. We have to get on with the trial.

Q Mr. Kraics, do you know of your own knowledge whether or not the Chase Manhattan -- the division of the Bank Americard, Chase Manhattan division, paid rebate checks to Foto Factory, Limited at or about October, November?

A No, I do not.

Q You don't know this of your own knowledge? Do you have any knowledge of it at all?

A As a general system, they do have a rebate system.

Q But you don't know whether or not rebate checks were paid out?

A No, I do not.

Q Mr. Kraics, did you prepare a note or memorandum with regard to the history of this matter and your connection with it for the National Bank of North America?

A Excuse me?

Q Did you prepare a note, a memorandum regarding your connection with Foto Factory, Limited and conversations had with Foto Factory, Limited?

A Yes, I did.

Q You did. Would it refresh your recollection if I were to show you this note -- first of all, is this the note that you prepared?

A Yes.

Q Now, with regard to your own recollection regarding the -- the top here -- I draw your attention to the top of this page.

A Yes.

Q Do you have any knowledge with regard to rebate checks?

A With regard to rebate --

Q Paid by Chase Manhattan Bank Americard to Foto Factory, Limited on or about September or October of 1973?

A Only that I was -- only that which was spoken over the phone.

Q So you have some knowledge of it, the fact that it was paid or they did pay.

A I can acknowledge that it was paid. I do not have knowledge that it was paid.

Q You made reference to the payment of rebate checks at or about that time?

A Right.

Q Thank you. Now, we have another exhibit which is in evidence by the Government, Exhibit 53, a letter sent to customers by Foto Factory, Limited. Have you seen that before?

A Yes, I have.

(Continued on next page.)

Q As a matter of fact, Mr. Kraics, you participated in the drafting of that letter, did you not?

A That's incorrect.

Q You did not draft the letter?

A No. That was shown to me by Mr. SEminara.

Q I see.

Now, do you recall making the statment, letter draft sent to Mr. Walsh, messenger, to Mr. SEminara?

A Yes.

Q You sent out the revised letter? Do you recall making that statement?

A Yes.

Q When you made reference to the revised letter, which letter did you make reference to?

A There should be a letter contained in that -- what you have there.

Q All right. Did you also make the statement, Mr. Seminara told you he refused to meet with an attorney, but did agree to revise that as per our wishes?

A Yes.

Q All right. What letter do you make reference to?

A There is a revision of the letter that we had sent to Foto Factory to have them send out to their customers.

Q Other than the letter.

A Other than this, yes.

Q In other words, some letter which in substance is different from the letter that is there.

A I thought it would be clarifying the issue more to people who did not receive the merchandise.

MR. RIVERS: May I have this marked for identification?

THE CLERK: Defendant's Exhibit I, letter dated November 9, 1973, marked for identification.

Q I show you Defendant's Exhibit I marked for identification. I ask you whether or not this is the letter you composed.

A Yes.

Q That is the letter you composed.

MR. RIVERS: I will offer it in evidence.

THE COURT: Did it go out?

MR. RIVERS: I offer it in evidence based on the fact that the testimony was that he did not participate in the composition of Exhibit 53, but he -- however, he did compose this letter.

THE COURT: I don't know whether that is inconsistent.

MR. RIVERS: My point is, it's the same letter.

It is the same letter.

MR. FRIEDMAN: May I have a voir dire on this, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. FRIEDMAN:

Q I direct your attention to Government Exhibit 53. That was the first letter that Mr. Rivers showed you. You testified that you did not participate in the preparation of that letter; is that correct?

A Yes, that's correct.

Q Now, I ask you to look at the second letter that Mr. Rivers showed you, Defendant's Exhibit I for identification, dated November 9, 1973. Did you participate in the preparation of that letter?

A Yes, I did.

Q Now, the first letter that Mr. Rivers showed you, you stated you did not participate in the preparation of that letter. Now, did that in any way mention the 2.95 --

A No.

Q The second letter that Mr. Rivers showed you, the one that you say you participated in the preparation of, did you say that the 9.95 --

MR. RIVERS: I object to what he is --

THE COURT: Wait a minute. Let's not get -- I think the phraseology, Mr. Friedman, of that question is objectionable.

The only question is this. This second letter that you did participate in has 9.95 charges in it.

THE WITNESS: Yes.

THE COURT: Does the first letter have it?

THE WITNESS: No.

THE COURT: That's all.

MR. FRIEDMAN: Okay.

Q Did you make the suggestion that 9.95 go into the second letter?

MR. RIVERS: I object. That is a matter for redirect examination.

THE COURT: No. It is recross.

MR. FRIEDMAN: I'm sorry, Mr. Rivers. I have one other question.

THE COURT: If it is redirect instead of -- well, I don't want to ask it. What is it?

MR. FRIEDMAN: Voir dire.

THE COURT: I don't think the jury knows the difference. And to tell you the truth, it is hard

to distinguish at times.

MR. RIVERS: There is a difference.

MR. FRIEDMAN: I would like to ask one last question.

THE COURT: Is this going to be the voir dire?

MR. FRIEDMAN: Yes.

THE COURT: Voir dire generally is a series of questions to establish the admissibility of a piece of evidence. That's all. Not the contents of what it stands for. Although there are times that a few are blended together.

Is this in connection with the admissibility of this letter?

MR. FRIEDMAN: Yes.

Q Do you know, Mr. Kraics, the second letter that Mr. Rivers showed to you, the one that has $9.95 in it was actually sent out to previous customers of Foto Factory?

A No, I do not.

MR. FRIEDMAN: I would not object to the letter going in.

THE COURT: You never said --

MR. RIVERS: He doesn't know whether it was or not. My position is this. This gentleman participated in the formation of both letters.

THE COURT: I will not permit it into evidence unless there is some testimony that it was sent out.

MR. RIVERS: He made out the letter.

MR. FRIEDMAN: Your Honor, I have no objection to --

MR. RIVERS: On his credibility, I am asking for an admission.

MR. FRIEDMAN: I have no objection to the second letter going in with the limiting instruction to the jury that Mr. Kraics testified that he helped prepare that letter, but it is not -- he does not know whether or not in fact that letter went out.

MR. RIVERS: I object to this kind of interruption of my cross-examination.

THE COURT: Well, I think you are perhaps right. You can take that up on redirect. This is not -- you are going to have to listen to my ruling, Mr. Friedman. You may not like it,but --

MR. FRIEDMAN: I said I have no objection to it. You said you were going to let it in. I said I have no objection.

MR. RIVERS: I don't know how you can tell what the judge is going to do.

THE COURT: All right. Why don't you sit

down there, Mr. Friedman.

MR. FRIEDMAN: Yes.

MR. RIVERS: Thank you.

THE COURT: All right, go ahead.

CROSS-EXAMINATION

BY MR. RIVERS (Continued):

Q When you make reference to the formation of the letter with Mr. Seminara, you are not talking about Exhibit 53, are you?

A Could you repeat that?

Q When you make reference to the formation of a letter at your first meeting with Mr. Seminara, are you talking about 53?

A No.

Q You are not. What letter are you talking about?

A I assume it will be this letter, the second one.

Q So that you --

THE COURT: Was it marked Exhibit I for identification?

THE WITNESS: Yes.

THE COURT: Yes. That is dated November 9, 1973?

THE WITNESS: Yes.

THE COURT: The other letter isn't dated at all?

THE WITNESS: No, your Honor.

THE COURT: All right.

Q So when you sat and formulated the letter at that first meeting --

A Pardon me?

Q You sat and formulated a letter at the first meeting; is that correct?

A No, that's not correct.

Q You did not. Did you formulate a letter at any meeting?

A With the personnel in Bank Americard.

Q Isn't it a fact that you called Mr. Seminara on the phone and dictated a letter to him after your meeting with him in person?

A Yes.

Q Yes. And it was on the same letter -- the date, November 5, was it not?

A Right. The letter was confirmed.

Q Was it on November 5th?

A This letter --

THE COURT: Now, wait a minute. We are not going to have any of this --

Q Was there a second letter?

THE COURT: Are you talking about the letter -- are you talking about the letter of termination?

THE WITNESS: Yes.

THE COURT: That's different. If it is not in evidence, then we won't talk about it.

Q Other than this letter, there's another letter that you dictated to him on the phone; is that right?

THE COURT: Wait a minute. Did you dictate the first letter to him on the phone?

THE WITNESS: No.

THE COURT: You see, Mr. Rivers, it's misleading to ask him a question like that. There is another letter in addition to that that you dictated over the phone? There's no testimony that he dictated the first one.

MR. RIVERS: He did say he dictated a letter over the phone.

THE COURT: No. We are talking about the first letter. And you say other than the first letter -- what letter did you dictate over the phone?

THE WITNESS: I did not dictate any letter over the phone.

MR. RIVERS: I thought -- may we have it read

back? I thought he said he dictated --

THE WITNESS: If I did, I was in error.

THE COURT: All right.

MR. RIVERS: I am sorry.

THE COURT: No.

MR. RIVERS: I am sorry.

THE COURT: The jury knows what the evidence is. They will decide.

MR. RIVERS: Will you mark this?

THE CLERK: Defendant's Exhibit J, document dated 11/12/73.

MR. RIVERS: Thank you.

Q You already indicated this is your memorandum; is that right?

A Yes.

Q You made that memorandum on or about the time--

THE COURT: What one is that? I am sorry.

THE CLERK: Defendant's Exhibit J.

THE COURT: That is a new one.

THE CLERK: Document 11/12.

THE COURT: What's 12 got to do with the --

THE CLERK: The date of the document, November 12th.

THE COURT: All right.

Q Now, can you read that document over and tell me how many times you mentioned a letter to be sent out to customers?

THE COURT: This is J for identification.

MR. RIVERS: Right. A memorandum made by this witness that he already identified.

THE COURT: But he can't --

THE WITNESS: Yes.

THE COURT: He can't testify to it unless it's in evidence, Mr. Rivers. He can only identify it.

Q Can you tell -- can you remember how many times in that memorandum you mention the mailing out of a letter to customers?

MR. FRIEDMAN: I object to the form of the question.

THE COURT: Sustained. Now, you can put it -- you can ask him whether that's a letter that he dictated or prepared. And then you can offer it in evidence, but you can't have him testify with respect to a document that is not in evidence.

MR. RIVERS: Your Honor, may I be heard? May I ask a few questions to lay a foundation?

THE COURT: Sure.

Q First of all, did you make a memorandum?

A Which one are you talking about? I made a number --

THE COURT: I am sorry to interrupt, but I thought we were talking about a letter. I thought it was a letter. Now we are talking about a memorandum.

MR. RIVERS: I have to lay a foundation.

THE COURT: What is this?

MR. RIVERS: A memorandum.

THE COURT: Not a letter.

MR. RIVERS: A memorandum.

THE COURT: Is that right? A memorandum?

THE WITNESS: Are these what you are talking about?

THE COURT: Is that a memorandum or a letter?

THE WITNESS: No, it's a memorandum. Just a compilation of my notes.

Q Did you make that memorandum?

A This? Yes.

Q In that memorandum, did you make reference to a letter to be mailed out by Foto Factory to customers?

THE COURT: You have the same objection.

THE WITNESS: Yes.

MR. FRIEDMAN: I believe that Mr. Kraics first has to --

THE COURT: Why doesn't somebody offer it in evidence?

MR. RIVERS: I would like to. That's exactly what I would like to do.

THE COURT: All right. He will offer it in evidence.

MR. RIVERS: Before I can do that I have to lay some kind of --

THE COURT: No. He said he wrote it. It's in reference to a relationship at the bank with Foto Factory,isn't it? What more do you want?

MR. FRIEDMAN: Well, your Honor, I believe --

MR. RIVERS: I offer both the memorandum and the letter.

THE COURT: Wait a minute. We will take one thing at a time. Are we just talking about the memorandum now? You don't jump around. Take one thing at a time.

You object to the memorandum.

MR. FRIEDMAN: Yes. On the grounds, your Honor, that Mr. Kraics' memory has not been exhausted.

MR. RIVERS: I was trying to do that.

THE COURT: All right. His memory is exhausted.

MR. RIVERS: Thankyou very much.

Q Did you have any recollection as to the number of times you mention in that memorandum --

MR. FRIEDMAN: Objection.

Q (Continuing) -- the mailing --

MR. FRIEDMAN: Objection as to form. I believe the proper question should be, does he remember how many times on November 5th he talked to Mr. Seminara.

THE COURT: Yes. You asked him whether he remembers. Now, if he doesn't, will the memorandum refresh his memory.

MR. RIVERS: I am asking him with regard to the memorandum -- my question must be with regard to the memorandum. It is a proper question with regard to the memorandum.

THE COURT: No.

MR. RIVERS: I except to the Court's ruling.

THE COURT: I know you do. You're going to offer it in evidence or are you not?

MR. RIVERS: I would like to offer the letter in evidence first and then the memorandum -- I will then go to the letter and forget the memorandum.

THE COURT: Well, you're not going to mix it up this way.

MR. RIVERS: I'm trying to lay a foundation.

THE COURT: I know. I know exactly what you are trying to do. Address yourself to the letter now.

Q You say you composed the letter; is that right?

A The letter --

THE COURT: Which one, Mr. Rivers? I think you are talking about I.

MR. RIVERS: That's right, "I."

THE COURT: All right.

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CROSS-EXAMINATION

BY MR. RIVERS: (Cont.)

Q Did you compose the letter as a result of conversations had at Foto Factory Limited?

A I composed the letter based on the previous letter.

Q Which previous letter?

THE COURT: That's not dated. That's 53.

THE WITNESS: Government's 53.

Q At the time that you visited Foto Factory Limited , did you see Government's Exhibit 53?

A Yes, I did. It was given to me.

Q And did you not participate in the formation of Government's Exhibit 53?

A No, I did not.

Q Did you participate in the formation of a letter at all to be sent to customers?

A Yes. That would be Exhibit I.

Q Is that the exact letter that you participated in?

A Yes,it is.

MR. RIVERS: I offer it in evidence.

MR. FRIEDMAN: No objection, your Honor.

THE COURT: Offered it? It is accepted in

evidence. It is as simple as that.

THE CLERK: Defendant's Exhibit I, letter dated November 9, 1973, marked in evidence.

xxxx (So marked.)

MR. RIVERS: I'd like to read that to the jury in connection with the exhibit that Mr. Kraics said was formulated without his help. This is Government's Exhibit 53. The letter Mr. Kraics said was formulated without his help.

"Dear Customer, recently you have received a special introductory offer valued at $22.10. We have discovered an error in our computer printout since mailing the offer to you.

"If you are unable to use the item, we would appreciate the return of the merchandise.

"Please send your account number so we can credit your account promptly.

"However, if you are waiting for a film order or processed pictures, please specify at the bottom of this letter.A self-addressed envelope is inclosed for your convenience. Very truly yours, Foto Factory Limited."

THis is the one that was not participated in by Mr. Kraics. This one. The one I just read. This is

the one he said that he participated in. Foto Factory Limited, 240 Maple Avenue, Rockville Center, New York. 11570:

"Dear Customer, recently you have received a special introductory offer of prepaid film, processing envelopes valued at $22.10, which would cost you 9.95." That's the reference to 9.95.

"We have discovered an error in our computer printout since mailing the offer to you. As a result of that error the offer was mailed to customers who had not requested it and charges were processed to their Master Charge or Bankamericard.

"If you are unable to use these items we would appreciate the return of the merchandise. UPon receipt of this merchandise and if your account was among those inadvertently charged, we would issue a credit to your account.

"However, if you are waiting for a film order or processed pictures, please specify at the bottom of this letter. Please list it below your name, address and credit card number inthe space provided below.

"A self-addressed envelope is enclosed for your convenience. Very truly yours, Foto Factory," name

address, account number.

CROSS/EXAMINATION

BY MR. RIVERS: (Cont.)

Q Now, MR. Kraics, based upon my reading of the two letters, can you tell me wherein they differ, other than the U. S. Attorney's reference to 9.95?

A Well, I felt the second letter, the one that we had suggested Foto Factory send out clarifies the issue more.

THE COURT: And there is no evidence that that letter went out; is there?

MR. RIVERS: I don't know whether it did or not, your Honor.

At this point, for the purpose of this witness I am not asking him that question. I'm merely asking him what in his estimation is the difference between the two letters other than the reference to 995.

THE COURT: All right. What is the difference?

BY MR. RIVERS:

Q Other than the reference to 995; is there a difference in the letters?

A If you can give me both letters I can point out exact wordage, verbiage.

MR. FRIEDMAN: I believe the letters speak

for themselves and if the jury would like to examine them -- I am not sure what all this has to do anyway with the unauthorized charges.

MR. RIVERS: Your Honor, is this an objection or speech?

MR. FRIEDMAN: It's an objection on the grounds of relevancy.

THE COURT: It's a combination.

MR. RIVERS: All right.

MR. FRIEDMAN: All occurred after the 995 billings. I object on the grounds of relevancy.

MR. RIVERS: See, this is wrong.

THE COURT: Mr. Friedman, Mr. Rivers is right. If you want to make that summation, you make it at the time summation is due.

So I will sustain your objection, Mr. Rivers. But I do insist the issues be clear, that as of now, there has been no testimony that that letter has been sent out. THat's true.

MR. RIVERS: Yes. But I don't expect that from this witness. He wouldn't know.

THE COURT: As long as we know that's true.

BY MR. RIVERS:

Q Let's establish one thing: With regard to

Exhibit No. 53, do you know of your own knowledge whether or not Exhibit 53, the letter which does not mention the 995, was sent out? Do you know that?

A No, I do not.

Q So you don't know whether this one was sent out and you don't know whether that was send out; correct?

A Yes.

THE COURT: That's why we wonder why --

MR. RIVERS: This is the Government's Exhibit and this is the DEfendant's Exhibit. He can't say whether it was sent out or not.

THE COURT: It makes no difference.

MR. RIVERS: He can't say whether it was sent out. That's the point.

THE COURT: Stay back there and don't get excited. He can't say it. I wonder why. I wonder why we go into this. If you have -- as I understand it, it was admitted.

I am not sure about that but Exhibit 53 went out. I don't know whether that's so or not. Was it admitted?

THE CLERK: It's admitted.

THE COURT: No, no. Not that it was admitted into evidence, that it went out.

MR. RIVERS: By whom?

MR. FRIEDMAN: Mrs. Grillo, I believe, your Honor, testified that she prepared Exhibit 53 from Mr. Seminara's dictation and that it went out.

MR. RIVERS: I don't think that was her testimony. She merely said it was prepared. At any rate, there is no testimony from this witness as to either exhibit going out.

THE COURT: All right.

BY MR. RIVERS:

Q Now, with regard to Bankamericard, Mr. Kraics, do you have a retail installment contract agreement with the persons who use the card?

A Yes, we do.

Q Under the terms of that agreement, does it take 25 days for the person to be charged?

A It can take that long.

Q Yes. It can take that much.

Isn't it a specific fact that the person is not charged until 25 days has elapsed with respect to one percent interest, one and a half percent interest or one and a quarter interest?

MR. FRIEDMAN: I object, your Honor, on the grounds of relevancy.

MR. RIVERS: May you take it subject to connection?

THE COURT: Yes. Only subject to connection.

Q Is that a fact or not?

A Yes, that is correct.

Q Now, in that period of time, can you say of your own knowledge whether or not there can be a credit given for a person who does not want the particular item or for some other reason?

Is that an adequate length of time?

A Yes.

MR. RIVERS: I have no further questions. Thank you.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. PINCUS:

Q Mr. Kraics, do I pronounce that correctly?

A Kraics.

Q Kraics, I'm sorry.

There is no need, is there, for a signature on a mail or phone order, on the slip?

A That is correct.

Q And regardless of what the floor limit would be, whether it's $15.00 or $50.00, if it was a mail or phone

order, there would be no need for a signature?

THE COURT: That's what he said.

A Yes.

THE COURT: Can't we proceed a little faster?

MR. PINCUS: I'll try, your Honor.

Q Could you tell us the date, approximately, when the Foto Factory account with your bank, the Bankamericard account,was closed?

A The account was closed?

Q Yes.

A That would be sometime in April.

Bankamericard deposits, it was closed -- in November.

Q But nevertheless, the bank kept the account open until approximately April 23, does that refresh your recollection.

A I believe so.

THE COURT: We are not talking about the credit card account. Are we? That account was closed November 9, is that right?

THE WITNESS: It is around November, I think.

THE COURT: What?

THE WITNESS: I think it's the 7th, I believe.

Q How many accounts did Foto Factory have with

your bank?

A They had one checking account in which they were able to deposit both Bankamericard and the normal.

Q That account wasn't closed until April 23 of 1973?

A I believe so.

Q '74? I'm sorry. April 23, '74. Is that a fact?

A I believe so.

MR. FRIEDMAN: Which portion of the account is Mr. Pincus referring to now, your Honor, the Bankamericard deposits or the checking account.

THE COURT: We have to be clear. That is right.

Mr. Kraics, was the credit card portion of that account closed before April?

THE WITNESS: Yes, it was, your Honor.

THE COURT: Sure.

Q But there was only one account, Mr. Kraics?

THE COURT: That is right. Nevertheless, a credit card portion of it was closed in November 7th?

THE WITNESS: Right, I believe so.

Q But the balance of the account was the same account and it remained open until April 23 of 1974?

A Yes, I believe so.

Q Now, when Mr. Seminara had a conversation with you, I believe you testifed that he produced two lists of computer names which were similar to the ones in evidence, isn't that so?

A Yes.

Q And did they contain, if you know, names other than those which were your cardholders?

A Not that I saw.

Q I see.

Did you examine them carefully?

A I examined the Bankamericard list.

Q You examined the Bankamericard list?

A Yes.

Q WHat did the other list contain, did you know?

A I believe the other list contained Master Charge names. He just took a quick glance.

Q They weren't mixed together, were they?

A No. Two separate.

Q Did you ever have any conversations with Mr. Stephen Lent?

A Yes, I did.

Q Was that about --

A Excuse me. I had a conversation with Mr. Lent. I don't know whether it was Stephen or Michael.

Q Well, would you recognize that man that you had the conversation with sitting here in this courtroom?

A I would recognize Mr. Seminara, who was the only person I saw.

Q You only saw Mr. Seminara, no one else?

A No.

Q You don't know whether the other conversation was in a telephone conversation?

A Yes.

Q Youdon't know whether it was with Michael or Stephen Lent?

A I don't make reference to it in my notes.

Q Now, with reference to the amounts that were credited to the credit card account of Foto FActory, do you recall the amount that was credited?

A It would be the sum total of 995 ten times 765, minus the discount amount that we charged them.

Q I see.

And would you give us a rough idea of how much that would be?

A I believe I gave that in testimony Friday.

THE COURT: You have to talk a little louder.

THE WITNESS: I believe that number was given in the testimony Friday.

Q Would it refresh your recollection if I said it was about $6500?

A That doesn't seem like the correct amount.

Q I see.

Well, do you recall -- this perhaps may refresh your recollection.

Do you recall that on November 22, 1974, before the Grand Jury on page 13 --

THE COURT: Now, I am going to say this: This has to be inconsistent. I am not going to permit it, unless it is inconsistent.

MR. PINCUS: Your Honor, this is the only --

THE COURT: You have done that before and I will not permit any more of this.

MR. FRIEDMAN: Your Honor --

THE COURT: If it is inconsistent you can let it in. If it is not it shouldn't come in.

MR. PINCUS: Your Honor, I'm tryig to bring out in this on e--

THE COURT: Ask him. He's here. That's why he's here.

MR. PINCUS: I just want to find out what happened to those funds, your Honor.

THE COURT: All right.

What happened to the funds, Mr. Kraics?

THE WITNESS: The $7,000?

THE COURT: Yes. Whatever it was.

THE WITNESS: I believe they were withdrawn from the account, or a portion of it.

Q A portion of it? All right.

Do you recall how much?

THE COURT: Mr. Pincus, we were left up in the air as to one statement that you made and we were going to check it with Friday's testimony.

MR. FRIEDMAN: That was Mr. Rivers, your Honor, on November 5 or 6.

MR. RIVERS: Your Honor, I did check this morning.

THE COURT: Do you have it?

MR. RIVERS: Yes. I checked it this morning and there are several references, fairly confusing.

MR. FRIEDMAN: Your Honor, I --

MR. RIVERS: Yes.

THere are several references. I wouldn't say it if it were not so. There is a reference on page 941 of the minutes that the Government has to a time when there was a first conversation held after November 2nd, which was November 6, according to the

testimony of Mr. London.

Then there is a reference on 955 again to November 6, but then there is a reference further on which says November 5th was the date that the tapes were returned.

So I don't really know what date it is. I made that plain in the beginning. You want to see the references?

THE COURT: You are talking about the amount in the account, not the date he saw these --

MR. RIVERS: The tapes. When the tapes were returned, yes.

THE COURT: The tapes.

MR. RIVERS: We have to have Mr. London back on the stand to clarify it, Judge.

THE COURT: Mr. Friedman, I did get copies of the testimony at the beginning.

MR. RIVERS: Here it is.

THE COURT: Let's clear this up, Mr. Pincus. You ask him how much was in the account on what date.

MR. PINCUS: All right.

CROSS-EXAMINATION

BY MR. PINCUS: (Cont.)

Q Now, can you tell us --

Q In looking over -- Mr. Friedman was kind enough to show me your testimony from the other day and would it refresh your recollection if I said that it was approximately $7200 that was in the account originally?

A Deposited from the 995 mailers.

Q As a result of the chargebacks that weremade, were credits given to the cardholders?

A Yes, they were.

Q And would credits have been given to all of the cardholdres who complained or returned the merchandise or for one reason or another didn't take it?

A Right. That's the way the system operates.

Q So that how much would you say, if you know, your bank credited to these cardholders?

A Our specific bank did not credit to the cardholders. Most of the cardholders were out of the State. So their individual banks credited them the money and then charged our bank.

Q All right.

So is it a fact then that every cardholder got their money back?

A I don't know.

Q Did everyone get a credit?

A ThaT I do not know. We do not handle the

accounts for everyone. We only handle accounts for our own customers.

Q I see. As far as your own customers were concerned, everyone got a credit?

A I cannot testify to that.

Q Well --

MR. FRIEDMAN: We haven't established if everyone complained, your Honor.

BY MR. PINCUS:

Q With reference to the $7200, could you tell us what happened to that money?

A I believe from the statements, it shows that the money was withdrawn.

Q All right.

Now, certain people were given credits through your bank, certainof your own cardholders, is that correct?

A Right.

They were caused to be credited by our agent who performs all the billing.

Q Do you know approximately how much of that was credited?

A I would say about 3500.

Q I see.

And the balance over the 3500, do you know if

that was ever credited to anyone?

A No, I do not know.

Q I see.

And you don't know whether or not any cardholder of any kind was done out of any money?

A No, I don't have those records available. We have a processing agent who performs all the billing collection, customer service work for us.

So those records are not available to us.

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CROSS-EXAMINATION

BY MR. PINCUS (Cont'd):

Q And they never tell you whether or not these people were credited?

A No. They do not. Only on a charge back situation would they know that they were not.

Q Can you tell us, in your opinion, whether anyone did lose any part of the amount over and above what your bank credited to the cardholders?

A That's an opinion. I don't have the facts to back it up either way.

Q You don't have any opinion, though?

THE COURT: An opinion? I don't know, Mr. Friedman, whether you object or not.

MR. FRIEDMAN: I don't objection, your Honor.

THE COURT: But for the sake of the Jury, opinions are not admissible. Don't ask that question. I won't permit it.

BY MR. PINCUS:

Q Based upon your procedures that the bank follows with reference to credits, was everyone credited or do you know of any that were not credited?

A I know of no credits that were issued by Foto Factory. We have a unique arrangement within Bank Americard

in that we own your own portfolio of accounts and act, as they call it, a Class A Bank Americard bank which issues cards and does all the fundings.

We contract with an agent in New York City who performs all of the operations or a good deal of the operations, all billing, all customer services and everything for us.

They accept all the income and all the expenses associated with that.

Q All right. I am -- I hate to be repetitious but I do want to know whether anyone of the cardholders was charged and not credited?

A I cannot say if they were or if they were not.

THE COURT: That's a pretty broad question. You are not limiting to $9.95 or anything else. You are just making a broad statement, Mr. Pincus.

Don't you want to direct your conversation -- your questions to $9.95 charge or everything else? Everything else is not involved in this case.

MR. PINCUS: I believe the testimony of this witness was regarding the $9.95 charges, was it not?

THE COURT: I guess your questions are limited to $9.95 then, aren't they?

Q Was the $7,200 in connection with the $9.95

offers?

A Yes, it was.

Q All right. So now getting back to that, to those specific charges. do you know of anyone who was not -- who had not received a credit with respect to those offers?

A No, I do not know of any individual.

Q Do you think that -- I shouldn't say that.

You have no knowledge of anyone not receiving a credit?

A Nor do I have any knowledge of anyone receiving credit, except through a charge back.

Q I see.

A When they complained.

Q I only have one question, your Honor, in connection with his prior testimony. You testified November 22, 1974, before the Grand Jury.

Do you recall that?

A Yes.

Q And --

THE COURT: I assume this is inconsistent?

MR. PINCUS: I believe it is, your Honor.

THE COURT: If it isn't, I'm going to ask the Jury to disregard it because I have noticed this again and again, Mr. Pincus, with you.

MR. PINCUS: But, your Honor --

THE COURT: It only is admissible if it is inconsistent. You read it.

MR. PINCUS: There is confusion in my mind. I'd like to clear it up.

THE COURT: No. You can't try a case by just reading Grand Jury minutes.

BY MR. PINCUS:

Q Do you remember being asked a question on page 13, line 20:

"Question: Of the $6,500, how much did your bank actually lose?"

Do you rememberthat question?

A Yes.

MR. FRIEDMAN: How about the answer?

Q And do you remember the answer:

"Approximately $3,000"?

A Yes. Since then it's been higher.

Q Then the following question --

THE COURT: Where was that inconsistent to his prior testimony?

MR. PINCUS: It goes on with a couple of other questions, your Honor.

THE COURT: That's just exactly what I object to.

MR. PINCUS: He finally --

THE COURT: You can not try this case by simply reading Grand Jury minutes unless it is inconsistent. It just takes time.

I'll permit this other question. Then I want to caution you about future witnesses. You cannot do it that way.

BY MR. PINCUS:

Q All right. To save time, on page 14, line 7, "So, in your opinion, and based on your procedures, who lost the other $3,000?"

Do you remember that question?

A Yes.

Q And your answer, do you remember this answer: "I would assume it would be the cardholder"?

A Yes.

Q Do you remember that answer?

A Yes.

Q And the next question:

"The respective cardholders?"

And the answer: "Yes."?

A Yes.

Q Do you recall that?

A Right.

Q Now, as a matter of fact, you just testified, did you not, that --

MR. FRIEDMAN: Your Honor, I object.

Your Honor did not let Mr. Kraics answer the question today in Court, whereas he answered the question before the Grand Jury.

So I don't know what is inconsistent.

MR. PINCUS: I'm getting to that.

MR. FRIEDMAN: Your Honor, Mr. Pincus attempted to ask Mr. Kraics if he had an opinion as to whether any cardholders ere charged who did not get a credit and your Honor would not let him answer that question.

THE COURT: It was an opinion, yes. Any opinions -- that's right.

MR. PINCUS: Your Honor, he stated here today tha he didn't know if anyone was not charged-- was not credited.

THE COURT: He didn't know one way or the other.

MR. PINCUS: In his testimony he states --

THE COURT: An opinion; assumption, yes.

MR. FREIDMAN: Where -- the word is opinion, your Honor.

MR. PINCUS: On page --

THE COURT: He says, "I assume"?

MR. FRIEDMAN: The question is "So, in your opinion, and based on your procedures, who lost the other $3,000?"

"Answer" --

MR. RIVERS: Your Honor, may I object.

MR. FRIEDMAN: "I would assume it was the cardholder."

THE COURT: I strike all this out.

MR. RIVERS: May I object to this procedure --

THE COURT: Yes.

MR. RIVERS: -- of Mr. Friedman standing up and doing this.

THE COURT: Yes. I agree with you but I disagree with Mr. Pincus.

MR. PINCUS: I have no further -- I respectfully except.

THE COURT: Opinions are absolutely inadmissible unless they are opinions of an expert.

MR. PINCUS: I feel, your Honor, that it bears upon credibility.

THE COURT: I have ruled, Mr. Pincus.

MR. PINCUS: I respectfully except.

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No further questions, your Honor.

THE COURT: Yes. We had you up here before, Mr. Rivers.

MR. RIVERS: I know. I just want to ask one question, Judge.

THE COURT: Go back further, if you don't mind.

MR. RIVERS: I -- I'll give him room. I want to find the exhibit here.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. RIVERS (Cont'd):

Q Mr. Kraics, with regard to Exhibit 53, is this your typing or typing in your office?

A No, it is not.

Q With regard to Exhibit I, is that your typing or typing from your office?

A Yes. Looks like.

Q Looks like your typing from your office?

A Yes.

MR. RIVERS: May I have these two marked for identification?

THE COURT: They're in evidence.

MR. RIVERS: No. Two different ones.

THE CLERK: Defendants' Exhibit K, letter dated November 12, 1973.

(So marked.)

THE COURT: Copy of a letter, I guess?

THE CLERK: Excuse me.

THE COURT: Copy of a letter or actual -- all right.

THE CLERK: A copy. Defendants' Exhibit L, copy of undated letter marked for identification.

(So marked.)

BY MR. RIVERS:

Q Now, I show you Defendants' Exhibit K and Defendants' Exhibit L and ask you whether either one was typed from your office?

A No, sir. I don't believe we have the style of type.

Q Now, with regard to Defendants' Exhibit K, is it the same thing as Defendants' Exhibit -- that is, does it contain the same content that you identified as typing from your office, Defendants' Exhibit I?

A Yes, the content is the same.

Q And with regard to Defendants' Exhibit L, does it contain the same thing as the Defendants' -- the prosecutor's Exhibit 53?

THE COURT: 53, you say?

MR. RIVERS: 53.

THE CLERK: 53, yes.

MR. RIVERS: Form letter, Judge.

THE WITNESS: Yes, in general, it is. In each one though, there are -- just one difference here, which --

BY MR. RIVERS:

Q Where the addressograph area is, as to which side of the paper it is on?

A Right. Two words, Foto F-a-c-o. On the top of which is not on the one given here. And on this letter, Mr. Lent -- that I spoke to -- I don't have his first name --

Q The exhibit is in. It doesn't make any difference. I'm asking you with regard to the content. Is it the same?

In other words, you have a word off here and here; is that right? The same?

A Right.

Q These are form letters which are not made in your office; is that right, the two exhibits?

A Yes.

MR. RIVERS: I offer them in evidence.

MR. FRIEDMAN: Your Honor, I object. He testified that he didn't prepare those.

THE COURT: You get up. Tell me what you are talking about.

MR. FRIEDMAN: I'm sorry. I'd like to see them first, if I could.

THE COURT: All right.

MR. FRIEDMAN: Your Honor, may I conduct a very brief voir dire?

THE COURT: Go ahead.

VOIR DIRE EXAMINATION

BY MR. FRIEDMAN:

Q Defendants' Exhibit L, to the best of your knowledge, did your office prepare that?

A No, we did not.

Q Defendants' Exhibit K, to the best of your knowledge, did your office prepare that?

A No. Our office did not prepare it.

Q Have you ever seen Defendants' Exhibit L -- K or L before today?

A No, I have not. The only similar one I have seen is Government's Exhibit 953, which I --

MR. FRIEDMAN: I object, your Honor on the grounds of -- that he hasn't seen these before. There

is no connection.

MR. RIVERS: Your Honor, may I be heard?

These exhibits are the exact content --

THE COURT: It makes no difference.

MR. RIVERS: -- of what is in evidence.

THE COURT: No, they are not admitted in evidence.

Next case.

Of course, you can't bring those in evidence under the circumstances. His bank had nothing at all to do with them.

MR. RIVERS: He did not say that.

THE COURT: Next?

MR. RIVERS: Your Honor, may I be heard with regard to this?

THE COURT: He said they had the same content.

MR. RIVERS: And it was one he --

THE COURT: I have ruled, Mr. Rivers. You understand my rulings.

MR. RIVERS: Exception. No, I don't.

THE COURT: Well, whether you do or not, that's it. Next?

(Continued on next page.)

REDIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Mr. Kraics, you testified that National Bank of North America has a floor limit for Bank Americard retail sales.

Would you please tell us what that is?

A That is $50.

Q What is the general floor limit for mail orders and phone orders?

A It was $15.

MR. RIVERS: I object.

THE COURT: He's already said that sometime ago.

MR. RIVERS: It has been asked and answered again.

THE COURT: $50.

MR. RIVERS: Improper redirect.

BY MR. FRIEDMAN:

Q Mr. Kraics --

THE COURT: Stick to --

Q -- was Foto Factory Ltd., authorized under the terms of their contract with you to deposit mail and phone orders with your bank?

A No, they were not.

MR. RIVERS: Objection, I object to that.

It attempts to deviate from --

THE COURT: Wait a minute. Just object.

Read the question again. What was the question?

(Question read.)

MR. RIVERS: May I state my objection?

THE COURT: Yes.

MR. RIVERS: With regard to Exhibit 67, he's already answered and in fact the Court has reviewed it.

THE COURT: 67?

MR. RIVERS: The contract.

THE CLERK: Yes.

THE COURT: Yes.

MR. RIVERS: And reviewed it and found nothing in it with regard to mail orders. Now he's attempting to --

MR. FRIEDMAN: Floor limits, your Honor.

THE COURT: What? What did you say?

MR. FRIEDMAN: Your Honor --

MR. RIVERS: May I be heard?

Again he's interrupting. I am not finished.

THE COURT: I know you are not finished and you know I want to find out what your question is.

MR. FRIEDMAN: I'm sorry, Mr. Rivers.

THE COURT: We are going to conduct this trial

in an orderly way. We will not have yelling and interruption.

Go ahead, Mr. Rivers.

MR. RIVERS: I think the beginning of my cross-examination of this witness, I asked him a question about a contract, the floor limits, mail orders, non-mail orders and the Court --

THE COURT: There were no figures in that contract. I recall that very vividly.

All right.

MR. RIVERS: The Court read the contract over.

THE COURT: Yes.

MR. RIVERS: And found nothing which had to do --

THE COURT: That's right.

On the other hand, this man is familiar with the books and records of the bank and he had relationships with this customer and it is very unusual that an employer, an officer of the bank, can't testify from examination of these records what a floor limit was.

I would think we couldn't conduct a real trial without that.

MR. RIVERS: I am not objecting to that.

MR. FRIEDMAN: Your Honor, I --

MR. RIVERS: What I am objecting to, however, is the reference in Mr. Fridman's question of by the terms of the contract.

THE COURT: That objection -- well --

MR. RIVERS: When the contract speaks for itself.

THE COURT: The -- that's right. Isn't that right, Mr. Friedman.

MR. FRIEDMAN: Yes, your Honor.

For the record, your Honor, I believe that Mr. Kraics testified generally about what the floor limits were for retail and for phone orders on cross-examination and he was never asked for Foto Factory Ltd. was authorized to deposit mail and phone orders.

That's what I'm trying to ask him now.

THE COURT: He can ask that question, most definitely.

MR. RIVERS: By the terms of the contract, your Honor?

THE COURT: The terms of the contract -- but the terms, the relationship between the parties, do you know, Mr. Kraics?

THE WITNESS: What?

THE COURT: The answer to the question that

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Mr. Friedman --

THE WITNESS: For mail order?

THE COURT: Yes, the question --

THE WITNESS: Yes, it is $15.

THE COURT: He didn't ask --

BY MR. FRIEDMAN:

Q The last question I asked, was Foto Factory Ltd., authorized, with your bank, and by your bank, to deposit mila and phone orders?

A No, they were not.

THE COURT: All right. You don't find anything in the contract to that effect, do you?

THE WITNESS: No.

THE COURT: How do you know they weren't authorized? Just tell the Jury.

THE WITNESS: Okay. To have a mail order contract, we have an addendum which just amends the sections of the contract, to let the individual merchant submit drafts that don't have cstomers' signatures on them.

THE COURT: In other words, that's not the full contract between you and Foto Factory Ltd.?

THE WITNESS: No. In Exhibit -- that is the full contract.

THE COURT: That is the full contract but doesn't cover mail orders; is that what you are saying?

THE WITNESS: Correct.

THE COURT: You have a separate contract that covers mail orders?

THE WITNESS: Yes. It is an addendum.

THE COURT: Where is the addendum?

BY MR. FRIEDMAN:

Q I as you to look at Government's Exhibit 68. Are you able to identify that?

A Yes, I am. It is the addendum.

Q Is that a form addendum?

A Yes, it is.

THE COURT: Has that been admitted into evidence?

MR. FRIEDMAN: No, your Honor, it hasn't.

THE CLERK: No.

BY MR. FRIEDMAN:

Q Is it -- what is the addendum, that addendum, that form used in connection with?

A Okay.

MR. RIVERS: Objection, your Honor.

MR. FRIEDMAN: I'm laying a foundation, your Honor.

MR. RIVERS: He's testifying from something not in evidence.

THE COURT: Well, that's right.

Do you have such an addendum and is that the same type of -- he can certainly testify whether that is the same type of addendumwhich was used in his relationship with Foto Factory Ltd. for mail contracts.

THE WITNESS: Okay. This was -- this was not used by Foto Factory. They did not have this contract with us.

THE COURT: There you are.

BY MR. FRIEDMAN:

Q Was that addendum in existence when Foto Factory entered into their contract with your company?

MR. RIVERS: I'm going to object to that.

THE WITNESS: The form letter --

MR. RIVERS: If he did not have it, then it wasn't in existence.

THE COURT: I don't understand. That's very easy. If he didn't have it, then there is no authority.

Is that what you are saying?

THE WITNESS: Correct.

THE COURT: Very easy.

Q Now, Mr. Kraics, will you please explain to

the members of the Jury the practice that was in existence with your bank at the time that Foto Factory Ltd., signed their contract August 28, 1973?

MR. RIVERS: I object to the practice that was in --

THE COURT: About what?

MR. FRIEDMAN: Regarding signing a contract with the merchant who was going to be conducting mail and phone order business.

MR. RIVERS: Objection, your Honor.

THE COURT: What do you mean? What was -- I think what is relevant is what was the practice with respect between -- with respect to Foto Factory Ltd., and this bank. That's what is relevant.

Can you testify to that, Mr. Kraics?

THE WITNESS: What was in existence was a retail agreement.

THE COURT: You had a retail agreement with --

THE WITNESS: Covering the -- two of their retail outlet stores.

THE COURT: Foto Factory?

THE WITNESS: For Foto Factory, not covering mail order.

THE COURT: You had no agreement covering mail

order?

THE WITNESS: No.

THE COURT: That contract that is in evidence does not cover mail order; is that what you are saying?

THE WITNESS: No, it does not. I'm sorry.

THE COURT: But did you have a retail contract?

MR. FRIEDMAN: The contract that is in evidence is this one.

THE COURT: What's that?

MR. FRIEDMAN: The contract between Foto Factory and National Bank of North America.

THE COURT: For retail?

THE WITNESS: For retail.

THE COURT: That's the only one?

THE WITNESS: Yes.

THE COURT: That covers everything?

THE WITNESS: No. That covers just retail.

THE COURT: But you had no other contract with them?

THE WITNESS: No other contract.

THE COURT: That's Exhibit what?

MR. FRIEDMAN: Exhibit 67 in Evidence, your Honor.

THE COURT: 67. That's the only relationship

you had with them?

THE WITNESS: In Bank Americard, yes.

THE COURT: All right.

BY MR. FRIEDMAN:

Q Under the --

THE COURT: That's called a retail contract?

THE WITNESS: Right, or merchant agreement is our terminology.

THE COURT: Merchant agreement.

All right.

Q Under the terms of the merchant agreement, was Foto Factory Ltd. required to have the cardholder present the card before they could write up a Bank Americard charge slip?

A Yes, they were.

MR. RIVERS: Objection.

THE COURT: I'll permit that. Of course, I'll permit that because Mr. Pincus brought out some evidence that said, from this witness, to the effect that when you have mail card charges you do nothave to have the customer sign it.

I think he brought that out. I am not going to let that say without testimony as to whether that is the fact in this case.

(Continued on next page.)

fols.

REDIRECT EXAMINATION

BY MR. FRIEDMAN: (Cont'd.)

Q Now, Mr. Kraics, when a merchant enters into a phone and mail order agreement with your bank or Bank Americard, is there any requirement with respect to when the merchant can deposit the charge slips based on a mail or phone order?

A Right. The addendum to the contract would state that between 15 and 30 days after the items are shipped out, would they deposit the individual drafts with our bank, to prevent billing in advance.

Q Are you saying then that with a mail or phone order, under your mail and phone order contract, that the merchant must wait at least 15 days before the merchant deposits the charge slip with your bank?

A Yes.

Q Fifteen days from the date of the sending -- sending out of the merchandise?

A Right. The contract reads, at least --

MR. FRIEDMAN: I'd like to offer the --

Q You can't read from that yet. I'm sorry, Mr. Kraics. It's not in evidence.

MR. FRIEDMAN: I'd like to offer Government's

Exhibit 68 in evidence.

MR. PINCUS: Objection, your Honor. It's not a part of a contract in this particular case by this witness's own statements.

THE COURT: As I understand it, there have been deposits of mail order charges to your bank?

THE WITNESS: Yes.

THE COURT: Therefore, I will permit it.

MR. PINCUS: Exception.

MR. RIVERS: May I have a voir dire?

THE COURT: Yes, --

THE CLERK: Government's --

MR. RIVERS: May I have a voir dire?

THE COURT: Yes, indeed. Yes.

VOIR DIRE EXAMINATION

BY MR. RIVERS:

Q Mr. Kraics, with regard to Government's Exhibit 68, was this part of a contract between yourself and Foto Factory Ltd.?

A No, it was not.

Q Do you know when it was made up?

A The form itself was made up, I think, around '71.

Q But you don't know that to be a fact, do you?

Is the form original?

A Well, the form in that specific content was, I think, in '71.

Q You think in '71.

A But it was when we first started. In '69 there was always a mail order contract.

Q You don't know about this particular form, is that right? Do you know about this form, Mr. Kraics?

A When that particular form was --

Q Do you know?

A No, not the particular form.

Q With regard to the form itself, is it not some printed words on a letterhead?

A Any writing is printed word on a letterhead.

Q But is this -- I am not talking about any writing -- I am talking about this piece of paper.

A Yes, that is.

Q Printed words on a letterhead from your bank?

A Yes.

Q Does it say anything on it about a contract, is the heading at least the contract?

A No, it's headed Addendum to a Contract. On the second page --

Q Is there any place here for it to be signed?

A Not on this particular page but on the second page that accompanies it.

Q There is a second page?

A Right.

Q Where is the second page? In other words, this is not a completed part of it?

A The second page would have listings where the bank would sign and the individual.

Q In other words, for this piece of paper to be completed, there would have to be another page to it, is that right?

A Right.

MR. RIVERS: I have no further objections. I object to this entry of this piece of paper.

THE COURT: All right.

MR. RIVERS: I'd like to have a piece -- the second page.

THE COURT: Let's not be dramatic about this.

MR. RIVERS: I'm not being dramatic. I'm just --

THE COURT: Mr. Friedman, are there two pages? Is that only one half of the contract?

MR. FRIEDMAN: Your Honor, this is the only page I've ever seen.

Q Mr. Kraics, is there a second page to this?

A Yes. That's the substance of the addendum, the second page just has the listing of both -- where the bank can sign and the individual merchant.

Q The signature page is merely a signature page?

A Yes.

THE COURT: Where is the second page?

Q Where is the second page, Mr. Kraics?

A I don't have one with me. I can produce one.

THE COURT: You'd better wait until you produce one.

MR. FRIEDMAN: Okay.

Q Mr. Kraics, does your bank have a requirement with mail and phone order charges that the merchant wait at least 15 days from the time that the item is sent out to deposit the charge with your bank?

A Yes.

Q What is the purpose for that requirement?

MR. RIVERS: I'm going to object.

A To prevent billing in advance.

THE COURT: I think we're going far afield. But I want to make -- want to find out from this witness just what the relationship was between -- was it National Bank of North America?

THE WITNESS: Yes.

THE COURT: And Foto Factory Limited. Now, you have introduced into evidence a contract. I think that was Exhibit 67?

THE CLERK: 67?

MR. FRIEDMAN: Yes.

THE COURT: All right. Now, that contract doesn't mention any floor limit, does it?

A No, it does not.

THE COURT: And is that the contract that covers mail orders?

THE WITNESS: No, it is not.

THE COURT: And that -- from that contract, from your practice, you are saying, are you not, that the Factory -- that Foto Factory Ltd. had no mail order arrangements with the bank at all?

THE WITNESS: That's correct.

THE COURT: Were not authorized to deposit any mail order charges to cardholders?

THE WITNESS: Yes, that's correct.

THE COURT: That's all.

BY MR. FRIEDMAN:

Q You've testified that Foto Factory Ltd. on October 18, 1973 deposited with your bank a gross of over $7,600 in mail order charges, is that correct?

A Yes, that's correct.

Q And they would be for the $9.95?

A Yes, they were.

Q And of the $7,600, they were off your 4-1/2 per cent fee, credited $7,200, is that correct?

A Yes, that's correct.

Q And how much money did your bank freeze when they -- on the account on November 7, 1973?

A I think it was approximately $700.

THE COURT: You have to speak up. You have $700, you say?

THE WITNESS: Right. I believe it was $700.

Q Now, you've testified that there is a mail order agreement, that Foto Factory Ltd. did not have one but nonetheless, they were able to deposit these charges, is that correct? On October 18th?

A Yes, they were.

Q And could you please explain how that took place, how they were able to do that if the agreement required that they only have retail charges deposited?

A In our operations area, it would be difficult to screen every charge coming through, as to whether the merchant does have a contract for mail order, for a number of other things or for retail. Each deposit cannot be verified

or checked back.

Q Do you know approximately how many deposits take place at your bank each day with merchants on Bank Americard system?

A I'd say between two and 3,000 deposits.

THE COURT: You have to speak louder really because I don't hear you.

THE WITNESS: Between two and 3,000 deposits.

MR. PINCUS: I object, your Honor, it's immaterial.

THE COURT: I'll permit it.

MR. FRIEDMAN: I have no further questions of Mr. Kraics.

THE COURT: All right. Any further questions?

Please step down, Mr. Kraics.

Now, are you going to offer anything on this mail order contract? If so, you had better have this other sheet.

MR. FRIEDMAN: The government calls Frances Nieman. While we are waiting for Mrs. Nieman, the question has been raised what was Mr. London's testimony regarding the date that he delivered the two computer lists and I would ask that at Page 931 of his testimony, that --

THE COURT: I don't have it. All right.

MR. FRIEDMAN: Lines 16 and 17 and read it to the members of the jury.

MR. RIVERS: If we'll do that I ask that 949 Lines 15 to 19 also be read.

MR. FRIEDMAN: I have no objections.

MR. RIVERS: And 943, Lines 6 to 17, Page 955, Line 18.

THE COURT: Oh no. We are not going to retry Mr. London's testimony or rehear it. Let me see your first page. What was the issue involved? November 5th? Is that all there is to it? If there is anything else to it, I am not going into it. As a matter of fact, I think we established, did we not, this was November the 5th, that he made the deliveries.

MR. FRIEDMAN: That was Mr. Kraic's, your Honor. I believe that was also Mr. London's testimony.

THE COURT: And also my notes show November the 5th.

MR. RIVERS: I have a couple of notes that say November 6th.

THE COURT: All our notes show November 5th but yours --

MR. RIVERS: No. I have a note that says November 6th also and ask the Court to --

10 THE COURT: You mean, November 5th also? 6th? MR. RIVERS: November 5th and November 6th.

THE COURT: What's November 6th?

MR. RIVERS: 941. Lines 15 to 19.

THE COURT: Line 41. Wait a minute. What line?

MR. RIVERS: 15 to 19.

THE COURT: You see, that's not a question of delivery. That's a question of talking, isn't it?

MR. RIVERS: The first time he spoke to him. And did work for him.

THE COURT: After.

MR. RIVERS: After he did the work.

THE COURT: When is the first time you talked to somebody about the preparation.

MR. RIVERS: November 6th.

THE COURT: It was October 17th. After it was prepared on November the 6th. But that doesn't mean it was not delivered before because he says, "Is it correct these new lists --", he says-- "Oh, yes, I think there is a distinction between the two." If you want that read, too, we'll permit it but that's all. We are not going any more than 941 and 951? All right. Let's have it. You read -- what do you want to read first, gentleman, 41, in order?

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MR. FRIEDMAN: Why don't we take the first page number, okay, Mr. Rivers. I don't know which one is first.

THE COURT: All right. Take it. Are we waiting form some --

THE CLERK: A witness, your Honor. Mrs. Nieman.

MR. FRIEDMAN: Mr. Rivers wanted read Page 941, Lines 15.

THE COURT: This is Mr. London?

MR. FRIEDMAN: Yes.

THE COURT: He -- you had better review this to the jury. As I understand it, he was the owner of the --

MR. FRIEDMAN: Computer company called Binary Control.

THE COURT: Binary Control. He was the owner and he testified.

MR. FRIEDMAN: Mr. Rivers wanted the following read.

THE COURT: When was that testimony?

MR. FRIEDMAN: The testimony was on July 2, 1975, last Wednesday.

THE COURT: All right. Go ahead.

MR. FRIEDMAN: The question by Mr. Friedman:

12 "Question: When was the first time that you talked to somebody about the preparation of that list?

"Answer: October 17th."

THE COURT: A little louder, Mr. Friedman.

MR. FRIEDMAN: "Answer: October 17th.

"Question: I mean, after it was prepared?

"Answer: On November 6th. Within a day or two."

I would like to have read to the jury Page 951, Lines 16, 17 and 18. When were the two lists that you prepared for November 1, 1973 delivered to Foto Factory Ltd.?

"Answer: November the 5th."

THE COURT: All right. Now, let's have the other witness.

F R A N C E S N I E M A N , called as a witness, having been first duly sworn by the Clerk of the Court, testified as follows:

THE COURT: N i e m a n ?

THE WITNESS: Yes.

THE COURT: Is it Miss or Mrs.

THE WITNESS: Mrs.

THE COURT: Miss? All right. Now relax. Just -- all right. You want -- don't have any fears, Miss Nieman.

DIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Miss Nieman, are you an employee of Foto Factory Ltd.?

A Yes, sir.

THE COURT: I am afraid we have to lift up the microphone.

THE CLERK: Your Honor, I can't turn it up any more. It will have terrible reverberation.

THE COURT: All right.

Q Mrs. Nieman, are you a former employee of Foto Factory Ltd.?

A Yes, sir.

Q When did you first start working there?

A July 17, 1972.

Q And --

THE COURT: 1973?

MR. FRIEDMAN: 1972.

A 1972.

THE COURT: 1972.

Q When you first started working for Foto Factory Ltd., were there offices in Westbury?

A Yes, there were.

Q And --

THE COURT: Was it a bicycle company?

THE WITNESS: Pardon?

THE COURT: Was it a bicycle company?

THE WITNESS: We sold bicycles also.

THE COURT: You sold bicycles,also?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. FRIEDMAN:

Q Now, did there come a time when Foto Factory Ltd. moved to Rockville Center?

A Yes, sir.

Q Were you working for them at Rockville Center?

A Yes, sir.

Q And do you recall when Foto Factory Ltd. moved to Rockville Center?

A Yes. April 13, 1973.

Q And what were your duties in April of 1973 when Foto Factory moved to Rockville Center?

A I was a full charge bookkeeper.

THE COURT: Can you hear? All right.

Q And in April of 1973, who did you answerto, who were your superiors?

A There were four superiors. There were Michael Lent, Stephen Lent, Dominick Seminara, Nicholas Mascara.

Q Now, did there come a time when you no longer answered to all four of these people?

A Yes, sir.

Q Approximately when did that take place?

A In September.

Q In September of 1973?

A Yes, sir.

Q Was it more towards the end of September?

A No. In the middle, September 16th, '73.

Q Do you remember that as being the date?

A 16th, 17th, yes.

Q Of September 1973?

A Yes, sir.

Q Whom did you start answering to on Septmeber 16th or 17th of 1973?

A Dominick Seminara and Stephen Lent.

Q And did anybody inform you that you would no longer be answering to Mr. Mascara or Mr. Michael Lent?

A Yes, sir.

Q Who informed you?

A Dominick Seminara.

Q What did he tell you?

A He told me that the company has split, that upstairs is going to be mail order where we receive all the mail order and downstairs would be strictly processing.

fB fls.

THE COURT: Would be what?

THE WITNESS: Strictly processing.

THE COURT: I see.

Q And you were working upstairs?

A Yes sir.

Q Would you please describe the activities that took place upstairs on September 16, 1973, generally?

A They were doing mail orders. First,they would take all the money from the mail orders, process the orders and send out the film.

Q Now, did Mr. Stephen Lent and Mr. Dominick Seminara have an office upstairs?

A Yes.

Q Did they have separate offices?

A No.

Q They shared the same office?

A Yes.

Q And at about the time that you were informed by Mr. Seminara that you would not be no longer answering to Mr. Mascara, but you would only be answering to Mr. Seminara and Mr. Stephen Lent, on or about that time were certain employees laid off?

A Yes sir.

Q Do you know how many employees were laid off?

A I would think close to 60 percent.

Q Do you know why they were laid off?

A Economic reasons.

Q Was business bad?

A Yes.

Q This was around the middle of September 1973?

A Yes.

Q Now, prior to September 15, 1973, do you know if there were any facilities for receiving phone orders?

A Prior to it?

Q Yes.

A Yes, there was.

Q I am talking about facilities other than just having the regular telephone --

A Do you mean the Watt line?

Q Will you please tell us what facilities the company had prior to September 15, 1973 to receive large volumes of phone orders?

A We had Watt lines.

Q Do you know what a Watt line is?

A Yes.

Q Will you please describe what a Watt line is.

A That is a toll-free number from anybody in the country who can call us toll-free and we would pay the bill.

We had I think two or three Watt lines. I am not sure how many we had.

THE COURT: This is before Septemb er 15?

THE WITNESS: Oh, yes.

Q Now, with respect to your duties after September 15, 1973, when you began to answer to Mr. Seminara and Mr. Stephen Lent, would you please explain what your duties were?

A Same. Full charge bookkeeping.

Q Now, September of 1973, were you familiar with credit card accounts that Foto Factory Limited had?

A Yes sir.

Q Where did they have the Bank Americard credit card account? Do you recall?

A We had two of them.

Q Where were they?

A National Bank of North America and the Chase Manhattan Bank.

Q How about with respect to Master Charge? What banks were they at?

A We had two of them. We had one in the Franklin National Bank and we had one in he First National City Bank.

Q Back in September of 1973, were you aware of

any requirements that were placed on the Master Charge account with the Franklin National Bank?

A If they were over $10, they had to be called in for an authorization number.

Q I am talking about the Franklin National now. Were there any other requirements that the Franklin National Bank put on the accounts? Not the First National --

A I am thinking of the wrong bank. I am sorry.

Q Well, did you --

A Franklin National Bank.

Q I'd like to go back for a moment.

Now, with respect to the Franklin National Bank, were you aware in September of 1973 of any requirement that they had put on your Master Charge accounts?

A Yes.

Q What requirements?

A They had to be imprinted cards. We had to have the customer card and the customer's signature on the hard copy, the bank copy. We weren't allowed to deposit any mail orders or phone orders.

Q Are you familiar with what a floor limit is?

THE COURT: What?

Q Floor limit.

A Yes sir.

Q Now, in September of 1973, were you aware of what the floor limit was for mail orders with any of the banks?

A Only the one.

Q What bank was that?

A First National City Bank.

Q What was the floor limit with respect to mail and phone numbers as you knew it in September of 1973?

A $10.

Q Did there come a time when you learned of a 2.99 introductory offer?

A Yes sir.

Q Who informed you of that?

A Dominick Seminara.

Q Do you recall the approximate date you first learned of this 2.99 introductory offer?

A Approximately when, sir?

Q Yes.

A It had to be around the -- well, it had to be the following week after the 15th. During that week, about the 16th, 17th.

Q Was it -- were you informed of it shortly after Mr. Seminara informed you that you would now be answering to -- only answering to him and Mr. Stephen Lent?

A Yes.

Q What did he tell you about the 2.99 introductory offer?

A He said that they were special mail introductory offers and that I was to deposit them in batches of 100.

THE COURT: In batches of 100?

THE WITNESS: One hundred hard copies.

Q You were to deposit what?

A Deposit the hard copies, the bank copies.

Q The bank copies of the Master Charge, Bank Americard, their sales slips?

A Yes.

Q Would you prepare from time to time the deposits for these 2.99 introductory offers?

A Yes sir.

Q And what would you receive from other employees, if anything?

A Just the hard copies, sir.

Q And when you would prepare a deposit, what copies would you prepare?

A I would have to take the tape.

Q What do you mean, the tape?

A I had to take an adding machine tape of all the deposit tickets enclosed. I had to fill out a summary

slip and deposit slip.

Q Did Mr. Seminara ever tell you how people were ordering this 2.99 introductory offer that they were being charged for?

A No sir.

Q Did there come a time when you learned about a 9.95 introductory offer?

A Yes sir.

Q By the way, how long did the 2.99 deposits go on for? Do you recall how long you did those?

A Only for a couple of days.

Q When did you learn about the 9.95 introductory offer?

A In September, sir.

Q Who informed you?

A Dominick Seminara.

Q Was it right after the 2.99 deposits stopped?

A Yes sir.

Q Did Mr. Seminara inform you about the 9.95 introductory offer?

A He said that it was a new offer and it's up to 9.95.

Q What instructions if any did he give you?

A It would be the same for the 2.99 deposit. In

batches of 100.

Q Who did you receive the hard copies of the charge slips from?

A I usually received them from Terry.

Q Terry?

A Terry Variello.

Q Did you ever see people preparing --

THE COURT: Wait a minute. There is some noise going on. It's like paper rattling. It might be a little difficult for the jury to hear. I'm sure it will stop.

All right, proceed.

Q Did you ever see these charge slips, the individual charge slips for the 9.95 introductory offer being prepared?

A Yes.

Q Who did you see prepare --

A Toni Epstein.

THE COURT: You will have to speak a little louder.

THE WITNESS: I am sorry. Toni Epstein.

Q Is she now Toni Variello?

A I guess so. I don't know her married name, sir.

Q Who else did you see?

A Terry Grillo, Ellen Kenneally and Joyce Quinn.

THE COURT: What were they all doing?

THE WITNESS: They were preparing the -- they were typing out the 2.99 mail introductory offers.

THE COURT: 2.99? I thought --

THE WITNESS: The 9.95. Excuse me.

THE COURT: They were typing out the 9.95 mail order, hard --

THE WITNESS: Hard copies.

THE COURT: Yes.

Q When you were observing them typing out these 9.95 charge slips, did you observe any computer lists on the table that they were working from?

A No sir.

Q Did you observe any documents on the table that they were working from when they were preparing the 9.95 charges?

A Yes.

Q What charges were those?

A Previous sales slips. Merchants copies.

THE COURT: That means over-the-counter when you say the merchant's copy? On the Master Charge and the Bank Americard there are three copies.

THE WITNESS: The merchant's copy.

THE COURT: You mean from a prior sale?

THE WITNESS: Yes sir.

THE COURT: All right.

Q Please look at Government's Exhibit 8 in evidence, the Master Charge sales slip form. Would you please indicate the portion that you would receive from the 9.95?

A I received a hard copy, back copy.

Q I see. Would you please indicate which copy you saw the employees using to prepare the 9.95 charges?

A They were using the -- which copies they were using to type from?

Q Yes. Regarding the previous sales.

A They were using this one here, the yellow one, the merchant's copy.

Q I see. And will you please step down, Mrs. Nieman. I would like you to look at some documents.

Did you ever see any of the employees using any of these computer lists, Government's Exhibit 65 in evidence?

A No sir.

Q How about Defendant's Exhibit E in evidence?

A I never saw any of these.

THE COURT: I assume you are saying, "No."

THE WITNESS: No, I haven't seen any of these, sir.

MR. RIVERS: The answer is that she has never seen any of them.

MR. FRIEDMAN: I would like the record to show that I am --

MR. RIVERS: I can't hear her.

THE COURT: I can't hear either.

MR. FRIEDMAN: I would like it on the record that she looked at each one of these exhibits, and I want to know whether she saw any of them before the 9.95 charges were being prepared.

THE COURT: All right, that's a good question.

MR. RIVERS: But she said she has never seen any of these before.

THE COURT: Yes.

MR. FRIEDMAN: But I would like the record to indicate which ones she's been shown.

THE COURT: All right.

Q You already testified that you have never seen Government Exhibit 65 before?

A No.

Q And Defendant's Exhibit F?

A No.

Q And Defendant's Exhibit E?

A No.

Q How about Government Exhibit 59?

A No sir.

Q Now -- would you please resume your seat?

Thank you.

Now, Mrs. Nieman, when you would prepare the summary slips for these 9.95 charges, what would you then do with them?

THE COURT: Wait a minute. After she prepared them?

MR. FRIEDMAN: Yes.

THE COURT: She didn't prepare them. She recorded them --

MR. FRIEDMAN: She prepared the deposits.

THE COURT: (Continuing) -- on the deposit slips.

I am sorry.

MR. FRIEDMAN: And the tapes.

Q What would you then do with them, Mrs. Nieman?

A I would have one of the boys from the mail-room deposit them in the bank.

Q Who were they?

A John Maloney was one of them. He would deposit them and --

THE COURT: You will have to speak up.

THE WITNESS: John Maloney.

THE COURT: Who else?

THE WITNESS: Fred Schroeder.

Q Do you recall the first date that you prepared the 9.95 charge deposits?

A Yes sir.

Q What date was that?

A 21st of September, sir.

Q 1973?

A Yes sir.

Q What was the last date that you prepared the 9.95 charge deposits?

A October 17th.

THE COURT: September 1? What is that?

THE WITNESS: September 21st.

THE COURT: And the last date was October 17th?

THE WITNESS: Yes sir.

Q 1973?

A 1973.

Q And did you receive the hard copies each working day between September 21st and October 17th, 1973?

A Yes sir.

Q Did you prepare deposit slips and summary slips each day between September 21, 1973 and October 17, 1973?

A Yes sir.

THE COURT: Each day?

THE WITNESS: Yes sir.

Q How many days a week did you work?

A Five days.

(Continued next page)

Q Monday through Friday?

A Yes sir.

THE COURT: I wonder if the jury wants a recess. If not, we will continue.

Very well. All right.

Q By the way, Mrs. Nieman, when you would prepare the summary and deposit slips and the tapes that contained the hard copies, would you put them all into an envelope or package?

A Yes, I would, sir.

Q Would you please describe the envelope and package that you would put them into generally.

A Master Charge was sort of a -- like a pouch. It was a -- like a plastic pouch.

Q A plastic see-through pouch?

A Yes, a see-through. It had a little lock on it. You could open and close it.

And on Bank Americard, it was like an envelope where the summary was -- you know, the deposit summary was on top of the envelope. And I would seal that.

Q Now, I would like you to look at some documents where you are seated, Mrs. Nieman. Would you please look at -- first at Government Exhibit 56 in evidence. These are the Master Charge summary slips,

First National City Bank.

THE COURT: What number?

MR. FRIEDMAN: 56, your Honor.

Q By the way, did you have a chance to look at those exhibits earlier today in my office?

A Yes sir.

Q Are you able to identify all of those summary slips?

A Yes sir.

Q Are those summary slips that you prepared and gave to somebody to deposit in the First National City Bank for the 9.95 offer?

A Yes.

Q Did you prepare each and every one of those?

A All except for one.

Q All except for one?

A Yes.

Q What is the date of the one that you didn't prepare?

A 10/12/73.

Q Do you know who prepared that one?

A Yes.

Q Who was that?

A Donna.

Q Did she work at Foto Factory Limited?

A Yes sir.

Q Did you take that summary slip that you prepared and give it to somebody to deposit?

A Yes sir.

Q Now, next, Mrs. Nieman, I would like to direct your attention to Government Exhibit 62. These are the 76 summary slips, two of which are photostatic copies. These copies -- they are all in evidence -- that were deposited in the Chase Manhattan Bank. I ask you if you can identify them.

By the way, did you also look at those today earlier in my office?

A Yes sir.

Q And can you identify what those are?

A Yes.

Q What are these?

A These are summary slips for Bank Americard-

THE COURT: Can you hear?

All right.

Q Were those all prepared in the -- in connection with the 9.95 offer?

A Yes.

Q Did you prepare all of those?

A Yes sir.

Q I now ask you to look at Government Exhibit 70 in evidence. There are eight summary slips, Xerox copies in evidence, or microfilm copies already in evidence. Can you identify those?

A Yes sir.

Q What are those?

A These are Bank Americard summary slips for the National Bank of North America.

Q Did you prepare them?

A Yes sir.

Q At whose instruction?

A Dominick Seminara.

Q On what date?

A I don't know.

Q Could you look at the summary slip and see if the date appears on it to refresh your memory?

A 10/17.

Q October 17. Would that be the date that you prepared them?

A Yes sir.

Q I ask you to look at eight envelopes, all of which contain a tape. They are Government Exhibit 69 marked for identification. They are not yet in evidence.

Did you also see those earlier today in my office?

A Yes sir.

Q ARe you able to identify what those envelopes are?

A Yes sir.

Q What are the envelopes?

A These are the envelopes that went to the National Bank of North America that belonged to the summary slips.

THE COURT: I can't hear you.

THE WITNESS: Envelopes that went to the National Bank of North America. They went to the National Bank of North America.

Q Will you please look at the contents of each of those envelopes.

A An adding machine tape.

Q What is the contents?

A Adding machine tape.

THE COURT: Adding machine tape inside the envelope or what?

THE WITNESS: Yes sir.

Q Did you prepare that adding machine tape?

A Yes sir.

Q how about the adding machine tapes in the other seven envelopes?

A Yes sir.

Q Whose instructions?

A These were the bank's instructions. You have to have an adding machine tape to go along with your deposits.

Q Who specifically instructed you, if anyone, to prepare these eight envelopes with the eight tapes?

A Dominick Seminara.

Q On what date?

A That would be the 17th of October.

Q 1973?

A Yes sir.

MR. FRIEDMAN: At this time I would like to offer Government Exhibit 69, the envelopes and the tapes in evidence.

MR. RIVERS: Were these mailed to the bank or carried to the bank?

THE WITNESS: They were carried to the bank.

MR. RIVERS: I have no objection.

THE CLERK: Government Exhibits 69, eight envelopes containing adding machine tapes, marked in evidence.

MR. FRIEDMAN: Your Honor, may I pass one as a representative sample to the jury for their observation?

THE COURT: Yes.

MR. RIVERS: Your Honor, may I approach the bench?

(The following took place at the side bar.)

MR. RIVERS: Your Honor, I would like to request a recess.

THE COURT: Yes. I asked you before.

MR. RIVERS: i thought you were asking the jury.

THE COURT: All right, I will take a recess.

(End side bar.)

THE COURT: Is there a question pending?

MR. FRIEDMAN: No, your Honor. The jury was examining the tape.

THE COURT: All right. I think we will take a short recess, ladies and gentlemen.

(Whereupon, the jury retired from the courtroom.)

(Recess taken.)

(Whereupon, the jury entered the courtroom.)

THE COURT: Very well.

Q Miss Nieman, would you please look at Government

Exhibit 1-H in evidence. It's entitled Master Charge. Is that a hard copy?

A Yes sir.

Q Is that similar to the hard copies that you received from other employees to prepare your deposits for the 9.95 charges?

A Yes sir.

Q Would you please look at 1-G in evidence. Is that the same with respect to the Bank Americard?

A Yes sir.

Q Now, on 1-H it says Franklin National Bank on the form. Now, you testified that the Franklin National Bank would not accept hard copies of charges that weren't signed. Was that copy deposited in the Franklin National Bank?

A No sir.

Q Were --

THE COURT: What copy? 1-H is it?

MR. FRIEDMAN: 1-H.

Q Where was that deposited?

A That was deposited in the First National City Bank.

Q How can you tell?

A Because on the back they have the stamp on them.

First National City Bank received it.

Q Is that the FNCB?

A Yes.

THE COURT: Was this the Bank Americard?

MR. FRIEDMAN: Master Charge.

THE WITNESS: Master Charge, sir.

THE COURT: Master Charge.

Q Now, nonetheless, would you have Franklin National Bank forms that you would use, but deposit with the First National City Bank?

A Yes sir.

Q I see. You testified that you were from time to time in the order room and you saw the other women preparing these 9.95 charge slips from old customers and the merchant's copies of the old sales; is that right?

A Yes sir.

Q What would these -- if anything, were these old sales slips in? Were they in boxes? Were they on tables?

A Some of them were in the file cabinets. The current ones were in the file cabinets. Some were in boxes in the back room.

Q Did you ever hear Mr. Seminara or Mr. Stephen Lent state anything with respect to the boxes that some of the slaes slips were in of the old customers?

A Yes.

Q Approximately when?

A That would be around the second week of October.

THE COURT: Around what? Second week?

THE WITNESS: Second week in October, sir.

Q '73?

A Yes sir.

Q Who was it that you heard make a statement about the old sales slips in boxes?

A Dominick Seminara was asking if we had all the charge slips. You know, if we used up all of the sales charge slips. And Donna said, no, there were some more in the back.

Q What charge slips are you referring to?

A The merchant's copy.

Q Of the old sales?

A Yes sir.

Q What did Mr. SEminara say, if anything?

A He said, well, bill them, too.

Q Bill them in connection with what?

A With the 9.95 orders.

Q This was in the second week in October of 1973?

A Yes sir.

Q Did he have a computer list at the time he made that statement?

A No sir.

Q Between September 21, 1973 and October 17, 1973, Mrs. Nieman, did you have occasion to go into the shipping room?

A Yes sir.

Q Who was in charge of the shipping room?

A Fred Schroeder.

Q Who else worked with Fred Schroeder in the shipping room?

A There was John Maloney and there was Theresa -- I don't remember her last name.

Q Did you ever observe them -- any of them cutting tissue copies of these 9.95 charge slips?

A Yes sir.

Q Who did you observe doing that?

A That was Theresa.

Q What was she using to cut these tissue copies of the 9.95 charges?

A A cutting board.

Q Cutting board?

A Yes sir.

THE COURT: What do you mean by tissue copy?

THE WITNESS: They were the customer's copies.

THE COURT: Same thing as the -- that we were talking about before, weren't we?

THE WITNESS: No. Before we were talking about the merchant's copies.

THE COURT: I see. I am sorry.

Q Who ordinarily got the customer's copy and the charge slip? Do you know?

A Ordinarily on a regular sale?

Q Yes.

A The customer should.

Q Prior to the 9.95 operation, did you see customer's copies of the charge slips being put into envelopes or packages that would be mailed out to customers?

A Yes sir.

Q But that wasn't being done in connection with the 9.95's?

A No sir.

Q They were being cut up?

A Yes sir.

Q Mrs. Nieman, I would like to direct your attention to -- withdrawn.

Did there come a time, Mrs. Nieman, when you became aware of previous credit card holders who had dealt

with Foto Factory complaining about being charged 9.95?

A Yes sir.

Q For something that they didn't order?

A Yes sir.

Q And approximately how many days after September 21, 1973, when you prepared the first 9.95 deposits, did you become aware? How many days?

A About ten working days.

Q How did you first become aware of the customers complaining about being charged 9.95 for something that they had not ordered?

A Well, the girls that were working in the customer service department had told me about it.

MR. PINCUS: Objection to what she was told.

Q Were these employees of Foto Factory?

THE COURT: Wait a minute. Were they employees?

THE WITNESS: Yes.

THE COURT: I will permit it.

Q Who told you about it?

A Donna Scottoquasi (phonetic).

THE COURT: Who?

THE WITNESS: Donna Scottoquasi.

Q Is that sometimes pronounced Cottoquasi?

A It's very hard to pronounce the name.

Q What did she tell you?

A She was saying that she was getting a ton of complaints, phone complaints about the 9.95 offer.

MR. RIVERS: May the record bear my objection.

MR. PINCUS: Mine, too.

THE COURT: Yes. She was working there, was she not?

THE WITNESS: Oh, yes sir.

Q And what did she tell you was the substance of this ton of complaints that she was receiving?

A Well, she was -- mostly they object to the fact that they did not order this material and they don't want to pay for something that they didn't order, didn't request.

Q This was approximately 10 working days after September 21, 1973?

A Yes. Approximately.

(Continued next page)

Q And between September 21, 1973, and the date that you first heard about these complaints, was Mr. Seminara -- did he ever check on you to see if you were depositing these $9.95 charges?

A Every day.

Q How about Mr. Stephen Lent? Would he ever check on you?

A Yes, sir. Every day.

Q When they checked on you -- when Mr. Seminara would check on you, what would he say? How would he check on you?

A At the end of each day I would have to give him a bank balance of all our bank accounts so we would know how much we have in the banks. And he would ask how much pertaining to the $9.95's.

Q Would you give him a figure?

A Yes, sir.

Q Would Mr. Lent be there from time to time when Mr. Seminara would inquire on a daily basis as to how many $9.95 charges you deposited?

A Yes. They were together.

Q Would Mr. Stephen Lent check with Mr. Seminara not being there?

A Yes.

Q Now, after you heard of the complaints, which was about 10 working days after September 21st, that was the first time you heard about them, did you continue to hear about these complaints from other employees from that first time?

A Yes, sir.

Q Until October 17, 1973?

A Yes, sir.

THE COURT: From whom?

Q From whom?

A Well, there was -- we had a small retail store downstairs. And Tom Edwards was down there and he would come up a couple of times with a credit slip saying, the customer's really complaining. We should really give them a credit, et cetera.

THE COURT: Was this your - was it within your jurisdiction to give them a credit on the books without being authorized?

THE WITNESS: No, I couldn't do anything without having it authorized.

Q Authorized by whom?

A By Dominick and Stephen Lent.

Q Well, when Mr. Edwards came up with the request for the credits, did h e ask you or did he ask

somebody else?

A Sometimes he would tell me. If they were busy, I would go in and tell --

Q You would tell?

A Dominick and Stephen Lent that this customer is complaining.

Q What would you tell them he's complaining about?

A That they wanted their money refunded or that they wanted the -- you know, the credit to their account.

Q Would you tell them that they were charged $9.95 and they indicated that they had not ordered it?

A No. Just the customer complaining. And you could tell from the orders, the introductory order --

Q Please. I didn't hear you. Could youplease speak a little louder.

A When I went in with the credit voucher, it was on the mail credit. So we would know just from the credit slip.

Q I see. When did you first bring these to Mr. Seminara and Mr. Stephen Lent's attention? Approximate the date and month of 1973.

A That would be in October. Around the 1st, 2nd week in October.

Q Of 1973?

A 1973. Yes.

Q What would Mr. Seminara and Mr. Lent say to you?

A On some of them, I could deposit them. On others, we held them.

Q Did they tell you to hold some of them?

A Oh, yes.

Q Did they tell you why?

A Yes. We needed the money. We couldn't credit the account.

Q Did you ever have any conversations with Mr. Seminara and Mr. Lent with respect to people who were complaining very vigorously about being charged $9.95 for something they hadn't ordered?

A Not that I really recall.

Q Now, did anybody ever inform you about a computer error with respect to the $9.95 charges?

A Yes, sir.

Q Who informed you of the computer error?

A Dominick Seminara.

Q Approximately when did that take place?

A That took place around the 1st in October -- first week in October.

Q What did he tell you?

A He said if any customer calls up, it's a computer error.

Q Any customer calls up about what?

A Complaining about the introductory offer.

Q That you would tell them it was a computer error?

A Yes. And we would credit their account.

Q After Mr. Seminara told you about that, did you continue to prepare the $9.95's for deposit?

A Yes, sir.

Q And Mr. Seminara continued to check on you when you were preparing these deposits?

A Yes, sir.

Q Did he continue to inquire at the end of the day to see how many $9.95's had been deposited?

A Yes.

Q On a daily basis?

A Yes.

Q Up to October 17, 1973?

A Yes, sir.

Q How about Mr. Stephen Lent?

A Yes, sir.

THE COURT: This was after the complaints

came in?

THE WITNESS: Yes, sir.

Q Was this also after the computer error explanation that you were instructed to tell people about?

A Yes.

Q That Mr. Seminara told you about?

A Yes, sir.

Q Did Mr. Seminara ever tell you to stop preparing $9.95 charges?

A Yes, sir.

Q When did that take place?

A I prepared one on the 16th of October for the First National City Bank, but it was denied. They wouldn't accept our deposit.

Q This was October 16, 1973?

A Yes, sir.

Q You prepared batches of 100's of $9.95 charges for deposit?

A Yes, sir.

Q And they wouldn't accept them?

A They would not accept them at the bank. No, sir.

Q First National City Bank?

A Right.

Q Well, what instructions, if any, did you receive from Mr. Seminara?

A Well, we held that batch, those deposit slips, you know, that they were all prepared. I held them out. But I still deposited Bank Americards.

Q I see. Did Mr. Seminara know on October 16, 1973, that the First National City Bank did not accept these charges?

MR. RIVERS: Objection. How can she testify as to --

MR. FRIEDMAN: I will withdraw the question.

THE COURT: All right, he withdrew the question.

Q Did you tell Mr. Seminara that the First National City Bank refused to accept these $9.95 charges on October 16, 1973?

A Yes, sir.

Q Now, starting onSeptember 21, 1973, did you receive any instructions from anybody regarding withdrawing the money that was credited to Foto Factory Limited that went into the various credit card accounts as a result of the $9.95 charge?

A Yes, sir.

Q Who gaveyou instructions?

A Dominick Seminara.

Q What instructions did you get?

A I was to withdraw all the money except for $100 minimum balance in each of the accounts.

Q Could you please give us an example?

A If I was to deposit, say, $7,000 in one day in the First National City Bank, I was to withdraw a $7,000 check and put it into Franklin National Bank, our regular account.

THE COURT: Youmean to transfer the account?

THE WITNESS: Just transfer, yes, sir.

Q Were you to transfer the money from the Chase Manhattan Bank as well as the First National City Bank?

A Right.

Q On a daily basis to the Franklin National Bank?

A Yes, sir.

Q Did you?

A Yes, sir.

Q Now, did anybody ever tell you why you were to withdraw this $9.95 money from the various banks and put it into the Franklin National Bank?

MR. RIVERS: I object to that. She didn't say $9.95 money. She said all the money from whatever source.

MR. FRIEDMAN: Well, I would like to clarify

it.

Q Mrs. Nieman, when you were instructed to withdraw the money from the various credit card accounts, what money was Mr. Seminara referring to?

MR. RIVERS: I object to what he was referring to. It is what he said.

THE COURT: No, I will permit it.

MR. RIVERS: Exception.

THE WITNESS: He was referring to the -- all the moneys that we deposited in these various accounts.

THE COURT: $9.95 moneys or all kinds of moneys?

THE WITNESS: Well, you see, you have a special account set up for Master Charge.

THE COURT: For $9.95's?

THE WITNESS: No. For Master Charge deposits only.

THE COURT: I see.

THE WITNESS: When we deposited money in there, it was withdrawn out and put into our regular account which we used for our daily business.

THE COURT: And these Master Charge or Bank Americard charges --

No, you can't do that.

Charge accounts were -- had in them not only

$9.95 charges, but all Master Charges or Bank Americard charges as the case may be; is that right?

THE WITNESS: That's right.

THE COURT: So it was not a Master Charge account for $9.95? It was just a Master Charge card account, period.

THE WITNESS: Right. That's all.

THE COURT: And if you deposited other charges in that same account at the same time that you deposited $9.95 charge slips --

THE WITNESS: Yes, sir.

THE COURT: (Continuing)--there could be some purchases downstairs where the consumer had signed the charge slips; is that right?

THE WITNESS: Yes. Some --

THE COURT: You could deposit those together?

THE WITNESS: Yes.

THE COURT: With the $9.95's? But it must be only credit card deposits?

THE WITNESS: Right.

THE COURT: And then you withdrew that out and put it in the regular checking account?

THE WITNESS: Yes.

THE COURT: You had two checking accounts in

each bank?

THE WITNESS: No. I had two in the Franklin National, one in the First National, and one in the National Bank of North America, and one in the Chase Manhattan, and one in the Bank of Delaware.

THE COURT: Let's take the Chase Manhattan. If you had a special credit card account in the Chase Manhattan, how could you -- and no other --

THE WITNESS: Well, I would withdraw --

THE COURT: How did you transfer --

THE WITNESS: I would withdraw a check and deposit that check into our regular account in the Franklin National Bank.

THE COURT: Then you never -- you wouldn't use the Chase Manhattan if you only had one account?

THE WITNESS: No. I wouldn't use them.

THE COURT: You would just use that for the card account?

THE WITNESS: Right.

THE COURT: And then you'd take it out and put it in the checking account of the Franklin National or the National City? Did they have that, too?

THE WITNESS: Yes. Same thing.

THE COURT: But not every bank had two accounts?

THE WITNESS: No. Just the Franklin National Bank had the two accounts that held our regular accounts.

THE COURT: Yes. And that was true -- and then the National City took that over and still that arrangement continued after National City took over the Franklin National?

THE WITNESS: Yes.

(Continued next page.)

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DIRECT EXAMINATION

BY MR. FRIEDMAN: (Cont.)

MR. FRIEDMAN: Your Honor, if I might interrupt again?

THE COURT: All right.

Q You testified that -- you testified that between September 21, 1973 and October 17, 1973, that at Mr. Seminara's and Mr. Stephen Lent's instructions or directions, you prepared deposits and in fact deposited 995 charges; is that correct?

A Correct.

Q And you testified that the summary slips that are in evidence arethe 995 charges that you prepared for deposit at First National City Bank, at Chase Manhattan Bank and National Bank of North America; is that correct?

A Yes, sir.

Q Now, you also testified that on or about SEptember 21st, 1973, Mr. Seminara instructed you to withdraw all but a hundred dollars from each of these credit card accounts on a daily basis and put it into the Franklin National Bank; is that correct?

A Yes, sir.

Q And this Franklin National Bank or Foto Factory Limited had its regular checking account for its daily

business activities?

A Yes, sir.

Q Is that correct?

A Yes.

Q Now, what percentage of the credit card deposits that you prepared between September 21, 1973 and October 17, 1973, were for the 995 charges?

A I would say close to 95 to 99 percent.

Q Was it over 90 percent?

A Oh, yes.

Q And so when you were withdrawing the monies from these three credit card accounts on a daily basis, were you in effect withdrawing over 90 percent -- in effect 90 percent of the money from the 995 charges?

A Yes, sir.

Q Mrs. Neiman, you testified that Mr. Seminara told you that -- told you on approximately September 16, 1973 that you would no longer be answering to Mr. Mascara and Mr. Michael Lent; is that correct?

A Yes, sir.

Q Did Mr. Seminara tell you who was going to be running Foto Factory Ltd. from September 16, 1973 on?

A Yes, sir.

Q Whom did he say would be running it?

A That would be Stephen Lent and Dominic Seminara.

Q Did Mr. Seminara at that time say anything with respect to who owns Foto Factory Ltd.?

A No.

Q Now, did there come a time when you learned that Mr. Dosch from the First National City Bank, had talked to Mr. Seminara about the 995 charges?

A Yes, sir.

Q And approximately on what date did you learn about that?

A Mr. Dosch called in around --- it would be about October 17, 18, just after we were -- were not allowed to use First National City Bank any more.

Q And after you became aware that Mr. Dosch called on the 17th or the 18th of October, did you receive instructions from Mr. Seminara to prepare credit vouchers for 995 charges?

A Yes, sir.

Q And how many did he tell you to prepare?

A A thousand, sir.

Q A thousand?

A Not a thousand credit vouchers, a thousand dollars worth of credit vouchers.

Q Approximately 100 995s?

A Yes, sir.

Q And prior to that date, how many credit vouchers -- approximately how many credit vouchers had been deposited with respect to all of the credit card accounts for the 995s?

A I don't remember, sir.

Q Could you estimate?

A Not too many, not too much money that I remember.

Q Now, when Mr. Seminara instructed you to prepare a thousand dollars worth of credit vouchers, at that time were you aware that the First National City account, Foto Factory account, had been frozen?

A Yes, sir.

Q Did you have authority to prepare credit card vouchers and deposit them yourself?

A No, sir.

Q Did you check with MR. Seminara each time that you did -- you prepared one?

A Yes, sir.

Q Did you ever check with Mr. Lent?

A No, sir.

Q Was MR. Stephen Lent ever present when you checked with MR. Seminara?

A Yes, sir.

Q And would Mr. Seminara each time that you told him that you wanted to deposit a 995 credit charge, would he authorize it?

A Yes, sir.

Q And how many -- on each occasion? By authority, I'm asking would he approve it each time?

A Oh, yes, sir.

Q Did he every refuse to approve it?

A Sometimes he said that we can't deposit any today. We need the money.

Q Now, during the time that you were at Foto Factory, Ltd., and in particular -- withdrawn. Between September 21 and October 17, 1973, did you ever see any newspaper advertisements or magazine advertisements in any of the other media about a 995 introductory offer in any media at that time?

A No, sir.

Q I ask you to look at Defendant's Exhibits A through D. They are newspaper advertisements. Two are dated October 28, 1973 and two are dated October 30, 1973. I direct your attention to the Foto Factory advertisements.

A Yes.

Q Have you seen those advertisements before today, Mrs. Neiman?

A No, sir.

Q Did you ever see any advertisements similar to that for a 995 introductory offer in any of the media?

A No, sir.

THE COURT: She didn't even see those.

MR. FRIEDMAN: That is correct, your Honor. That's what she testified.

Q Now, are you -- do you know the source for preparing the 995 charges?

A Yes, sir.

Q What was the source?

A Prior sales slips.

Q Was it in any advertising campaign?

A None to my knowledge, sir.

Q Now, you've testified that the First National City Master Charge account was closed on approximately October 16, 1973; is that correct?

A Yes, sir.

Q Do you know what date the Chase Manhattan Bank, Bankamericard account was closed?

A They were closed on the 17th.

Q You testified that the First National City

account was closed on or about October 16, 1973; is that correct?

A Yes, sir.

Q Now, do you know what date the Chase Manhattan Bankamericard account was closed?

A Yes.

It was about the 17th, 18th. RIght after First National City froze us.

Q I see.

Now, you testified that you prepared the deposit slips for the First National Bank of North America Bank-americard on October 17, 1973?

A Right, sir.

Q Would that have been done in the latter part of the day?

A I always did -- yes.

Q What time of day would you do that?

A I usually started working on them about 4:00, 4:30.

Q I see.

Now, who told you to use the National Bank of North American on October 17, 1973, rather than the Chase Manhattan Bank?

A Dominic Seminara.

Q Did he tell you why?

A No. He said we just better, you know, to use the other bank.

Q To use which bank?

A National Bank of North America.

Q Was this the first time that National Bank of North America had been used in connection with the 995 deposits?

A Yes, sir.

Q And to your knowledge, was it the only time that National Bank of North American had ever been used for the 995 deposits?

A I think I -- I'm not sure. I think I deposited another day or two later but --

THE COURT: Excuse me?

THE WITNESS: Another day or two later I made more deposits but I'm not a hundred percent sure.

Q Now, you testified that Mr. Seminara was checking with some of the employees to make sure that some of the old copies of previous sales were used to prepare 995 charges? Is that correct?

A Yes, sir.

Q And did that take place before October 17, 1973?

A Yes, sir.

Q And approximately, how many days before October 17, 1973?

A That took place around the beginning of October.

Q And did that take place after you became aware that customers were complaining about the 995 charges?

A If it wasn't after -- after, it was around the same time.

Q And did that take place before or after you had submitted credit vouchers to Mr. Seminara for his approval, so that people who were charged 995 could get a credit?

A It was around the same time, yes, sir.

Q When you would tell Mr. Seminara and Mr. Lent at the end of the day how many 995s you had deposited, would you tell them the total money amount?

Did you tell them the total money amount?

A Yes, sir.

Q And what, if anything, would they say to you?

A Nothing in particular. They would -- they asked me right away did I transfer the money into our regular account and I said: Yes, the checks are all drawn.

Q Now, did there come a time when you stopped receiving the hard copies to prepare for deposit?

A Yes, sir.

Q And do you know why you stopped receiving them?

MR. RIVERS: I object to why. I don't understand that.

Q Did anybody tell you --

THE COURT: Yes, you are right. Objection sustained.

MR. FRIEDMAN: I'll withdraw the question.

Q Did anybody tell you that you would no longer be receiving them?

A Yes, sir.

Q Who told you that?

A Terry.

Q Terry who?

A Grillo.

Q Did she tell you why?

MR. RIVERS: I object to that.

THE COURT: The same question.

Same objection.

Q What did she say to you?

A She said that we would no longer be typing out any more 995 offers.

Q Did there come a time when you no longer worked

for Foto Factory Ltd.?

A Yes, sir.

Q WHen did that take place?

A Friday after Thanksgiving, 1973.

Q Were you laid off?

A Yes, sir.

Q MR. FRIEDMAN: I have no further questions. Thank you, Mrs. Neiman.

xx CROSS-EXAMINATION

BY MR. RIVERS:

Q Mrs. Neiman, I only have four questions. Did the Foto Factory Ltd. use a computer company?

THE COURT: Did they do what?

Q The services of a computer company?

A Yes, sir.

Q And was it more than one computer company?

A Yes, sir.

Q How much did the Foto Factory Ltd. spend on advertisement? On advertising on a yearly basis?

A On a yearly basis? During the first year when we closed out our books on June 30, 1973, it was approximately two hundred fifty, three hundred thousand dollars?

THE COURT: 250 to 300,000 dollars?

THE WITNESS: Yes, sir.

Q In advertisement?

A In advertisement.

Q Yearly? Now, with regard to whether or not you saw Mr. Seminara with the printouts, Mr. Seminara didn't have a habit of walking around with printouts under his arm, did he?

A No, I've never seen him at all, sir.

THE COURT: You never see him or the printouts; which?

THE WITNESS: The printouts at all, sir.

Q But, as a matter of fact, they did use computer companies, right?

A Oh, yes, sir.

Q And with regard to whether or not you have seen the advertisements before that were shown to you that's in evidence, do you recall being asked this question before the Grand Jury, October 18, 1974?

"During the 995 offers, was this process by__ Foto Factory aware of any other other mail order that Foto Factory was receiving at that time"and giving the answer,yes?

Do you recall that?

A Yes, sir.

MR. FRIEDMAN: Page and line.

MR. RIVERS: That's page 10.

Q Now, do you recall the question:

"What for?"

And giving the answer: "Film with developing."

Do you recall that?

A Yes, sir.

THE COURT: Is this inconsistent?

MR. RIVERS: Yes, your Honor.

MR. FRIEDMAN: I don't believe it is.

MR. RIVERS: It is.

I'm going to go right through it and it's inconsistent. I repeat to the Court, it's inconsistent.

THE COURT: All right.

I'll take a look and see myself.

Q Do you recall the question: "Were you aware of the quantity?"

And giving the answer: Yes.

Do you recall that?

A Yes.

Q Do you recall the question: "Was the approximate quantity at the time 12 or 14 orders a day?"

And giving the answer: "Is that apart from

the 995 order?"

MR. FRIEDMAN: That's my question, Mr. Rivers, I believe.

MR. RIVERS: Yes.

And giving the answer: "At the time, about 12 or 14 a day."

Q Do you recall that?

A Yes, sir.

Q And do you recall the question: "Is that apart from the 995 order?"

And giving the answer: "Yes, sir."

Do you recall that?

A Yes, sir.

MR. RIVERS: May I continue and I'll be finished? It will take a short time.

MR. FRIEDMAN: Your Honor,may we approach the bench at this time? I'll ask that we approach the bench.

THE COURT: All right.

(Side bar follows.)

MR. RIVERS: I object at this point.

Mr. Friedman continues to do this. He does it everytime a question and answer comes up that might in some way injure what he's already laid out.

MR. FRIEDMAN: I'm not worried about that at all.

THE COURT: If it will injure him, let him injure his witness. I want to know whether it's inconsistent.

What do you have to say?

MR. FRIEDMAN: Your Honor, I believe that there is a typographical error there. "Is that apart from?" I believe that Mr. Rivers is trying to give the impression to the jury that that was a part of the 995s.

THE COURT: No, it is apart from.

MR. RIVERS: I am not giving any impression to the jury. I don't try to give impressions to the jury.

THE COURT: We don't care about this. I am tired of this bickering.

MR. RIVERS: I read the question --

THE COURT: Read the question. No more bickering.

(In open court.)

(continued next page.)

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CROSS-EXAMINATION

BY MR. RIVERS (Cont'd):

Q Do you recall the question:

"Question: Are you aware of what generated these others" -- "orders, 12 or 14 orders a day apartment from the $9.95 order?"

Do you recall that question?

A Yes, sir.

Do you recall the answer, "That was more than likely Modern Popular Photography"?

A Yes, sir.

Q And giving -- and the question, "Is that a magazine?" And the answer, "Yes"? And the question, "Did the Foto Factory put an ad in that magazine"? And giving the answer, "Yes"?

MR. FRIEDMAN: Your Honor, I object. It is not inconsistent with the testimony.

THE COURT: I don't see anything inconsistent.

MR. RIVERS: Except that during the $9.95 offer, there was an ad run.

MR. FRIEDMAN: The question was, was there an ad run with respect to the $9.95 and she said, "No."

MR. RIVERS: She testified there was no advertisements.

THE COURT: The Jury knows what she testified to. Let's not waste any more time with this type of argument.

The Jury will remember, I'm sure, very clearly, what she said.

Q Were you aware of all the advertisements that was run by this company?

A Yes, sir.

Q Were you aware of all of the communications, that is, the letters that went out as a result of computers or lack of computers?

A I don't understand your question, sir.

Q Are you aware of all letters that went out of this company to customers?

A No. I wasn't in customer service.

Q With regard to exhibit -- Defendants' Ehxibits L and K, did you see them before?

A "L" I've seen before.

THE COURT: Is it for identification? I assume it is.

MR. RIVERS: Yes.

Q How about "K", marked for identification?

A This one I haven't seen before, the "K", but "L" i've seen.

Q Are you aware of the equipment that was in the company at the time?

A The equipment? Yes, sir.

Q Are you aware of whether or not they had a mimeograph machine?

A Yes, we did, sir.

Q Did the mimeograph machine make Exhibit L?

A It looks like our machine, yes, sir.

Q How about Exhibit K?

A Yes, sir.

Q Made both exhibits?

A Looks like it to me, yes, sir.

Q Can you tell me whether or not either one or both were mailed out to customers?

A That, I don't know, sir.

Q You don't KNow with regard to either one of them?

A No, I don't know, sir.

Q But you can say the were made on your machine; is that right?

A Yes.

MR. RIVERS: I offer them in evidence again.

MR. FRIEDMAN: I object, your Honor. I'll restate my reasons.

She doesn't know whether she were sent out. All this took place after the 17th of October.

THE COURT: No. We will wait. I don't think that there has been sufficient evidence to justify it being admitted into evidence.

MR. RIVERS: I except to the Court's ruling.

THE COURT: All right. Let me ask you this question.

You said you knew all the advertisements that the company had placed in various magazines, but did you not also testify that you had never seen this advertisement of October 28th and 29th?

THE WITNESS: That's corect.

MR. FRIEDMAN: 30th, your Honor.

THE COURT: 30th. I don't understand it. If you knew all the advertisements that were being made, mailed out, why didn't you know about this?

THE WITNESS: I would know the advertisements pertaining with the order department.

THE COURT: Oh. This was not an order department?

THE WITNESS: No. These --

THE COURT: I don't see it. Let me see that advertisement.

THE WITNESS: Which one?

THE COURT: All right.

THE WITNESS: I would receive all the invoices for all the ads.

THE COURT: Why isn't that an advertisement, $9.95?

Why wouldn't you know about that?

THE WITNESS: Because I didn't receive the invoice for that, sir.

THE COURT: You didn't receive the invoice but you received invoices for the others?

THE WITNESS: All the others, yes, sir. And the order department would tell me what media is being advertised?

THE COURT: But they didn't tell you in this case?

THE WITNESS: No, nobody knew, that I knew of anyway.

BY MR. RIVERS:

Q The advertisement cover T.V., radio, magazines, news papers?

A Whether advertisements on T.V.? Yes, sir, there were, sir.

Q Do you know anything about computers or computer

tapes?

A Do I know anything? Yes, sir.

Q You do? With regard to these computers, can you tell me when they were ordered, that is, the printouts that are in evidence?

A These sheets?

Q Yes.

A Those I never saw an invoice to them. I don't know when they were ordered. We don't -- we used a computer in --

Q Go ahead.

A We used a computer in the end of July and in August, to print up sales slips, but I've never seen a computer printout sheet on them at all.

Q Were you working in 1972 for the company?

A Yes, I started in '72, sir.

Q And you were working in 1973, also?

A Yes, sir.

Q Is it your testimony that none of these computer printouts came through your office so you never saw them before?

A I have never seen them, no, sir.

Q Would they have been paid for by Foto Factory Ltd.?

A Should have.

MR. FRIEDMAN: I object.

THE COURT: Yes. I think she's gone over that very carefully, Mr. Rivers. She said she hasn't seen them before.

Do you know anything about them?

THE WITNESS: About them?

THE COURT: Yes.

THE WITNESS: No, but I know what we use computers for.

BY MR. RIVERS:

Q Do you know what Foto Factory Ltd., use computers for?

A Yes.

Q What did they use them for?

A We had one for the payroll. We had one computer that was strictly typed out little labels that would go on our brochure, to send to customers, to update on our sales and whatever. Andwe had another computer back in '73, July and August, that was printing out the sales slips for the checks; you know, for people to send in checks. They would print out their sales slips.

Q How about customer lists?

A No. Just the sticky labels for the mailers.

Q Did you ever hear of Camera Hut?

A Yes, sir. Camera Hut Industries, yes, sir.

Q Did they have a customer list?

A I don't know.

Q Do you know whether or not Foto Factory Ltd., ever used a customer list of Camera Hut?

THE COURT: If she didn't know they even had a customer list, how could she know if she used one?

MR. RIVERS: I'll withdraw a question.

THE COURT: You talk about advertisements in magazines. Mr. Rivers was talking to you about that and elsewhere.

Are the $9.95 advertisements?

THE WITNESS: The advertisements in the magazines, no. They were the regular full page ad on our film with processing and developing.

THE COURT: Nothing to do with $9.95?

THE WITNESS: No, nothing at all.

BY MR. RIVERS:

Q Did you see a copy of every ad ever run by this company?

A Yes, I would see the tear sheets on the back of the invoices.

Q The actual example of the ad itself?

A Yes, sir.

Q And you have never seen a tear sheet on a $9.95?

A No, sir.

Q What does a tear sheet look like?

A This is like a tear sheet. It's a copy of the media, the newspaper would sent you a page that it was drawn on and you know what page number it was on and to show a proof that it was printed.

Q So actually a page in the newspaper is a tear sheet?

A Yes. This is considered a tear sheet.

Q Do you know who did the advertisement -- who handled advertisement for Foto Factory Ltd.?

A Yes, sir.

Q Who was this?

A It was Forbes Advertising and John Johns Group.

MR. RIVERS: I have no further questions.

THE COURT: That was a large four, Mr. Rivers.

MR. RIVERS: A large what?

THE COURT: Four. Didn't you say you only had four questions?

MR. RIVERS: Yes, I know. One question leads to another.

CROSS-EXAMINATION

BY MR. PINCUS:

Q Now, Mrs. Neiman -- excuse me.

You testified I believe, that there came a time when Mr. Seminara told you that you would be getting your orders from him; is that so?

A Yes, sir.

Q From that date on, until you left the employ of that company, did Michael Lent and Nicholas Mascara continue to be on the premises? Were they there?

A Until I left the company?

Q Yes.

A No, sir. Nicholas Mascara left the premises on the first of November.

Q I see. Up until the first of November, from the time that Mr. -- from the time -- strike that.

From the time Mr. Seminara told you that you would be receiving your orders from him, when was that?

A When did he tell me? He told me on the -- about the 17th of September, on a Monday.

Q Between that time and November 1st, did Mr. Mascara continue to work there and get his checking regularly?

A He worked there, yes. But as far as getting the checks, no. They weren't regularly -- all principals

in the company did discontinue their pay because of the financial condition of the firm.

Q So that until Mr. Mascara left on November 1st, he was still a principal, was he not?

A I believe so, yes.

Q Did he have a right to sign checks until November 1st?

A Yes, sir.

Q And you testified about Wats line. Did calls come in on that Wats line from various places ordering materials of one kind or another?

A Yes, sir.

Q And did that continue up until the time you left?

A No, sir.

Q When did it stop?

A That was discontinued beginning of August. The end of July, beginning of August, middle of -- around that area.

THE COURT: You are talking about '73 all the time?

THE WITNESS: Yes, sir.

Q Now, I believe you testified that on or about the 16th of September 1973, was the first time that you

heard about the $9.95 offers; is that correct?

A No, sir.

Q When was it?

A It was a few days after that, sir.

Q I see. And as a matter of fact, did you know whether or not any orders were actually received from customers for the $9.95 offer?

A Yes, sir.

Q Were any?

A No, sir.

Q You're certain of that?

A Yes, sir.

Q And is it your testimony then that no orders were actually received by any -- by Foto Factory from any customers for the $9.95 offer?

A Yes, sir.

THE COURT: You know that? Do you know that from the books or how do you know that?

THE WITNESS: How do I know that, sir?

THE COURT: Yes.

THE WITNESS: From the files and where the girls were typing. Whenever we got an order in that was from the media, the little coupon, we used to attach that to the back of our merchant copy and there were

no coupons attached to the backs of our merchant copies.

MR. PINCUS: There is an inconsistency, if I may, your Honor.

Q I call your attention to the fact that you testified, if you recall, before the Attorney General of the State of New York on March 7, 1974.

Do you recall that?

A March 7th?

Q March 7, 1974, before Earl Roberts, Assistant Attorney General, State of New York.

A Yes, sir.

Q Do you remember? And I call your attention to page 35, about the middle of the page. Unfortunately they don't have numbers.

Do you remember being asked this question:

"Question:" --

THE COURT: Wait a minute.

MR. PINCUS: It's the third question down, Mr. Friedman.

THE COURT: All right.

BY MR. PINCUS:

Q "Question: Now, I understand your testimony is that you don't know whether any customers had

actually written in asking to have these orders sent or these charges made?"

Do you remember that question?

MR. FRIEDMAN: Which page was that?

MR. PINCUS: That's page 35.

MR. FRIEDMAN: Of the --

MR. PINCUS: Of the Attorney General, State of New York, dated March 7, 1974, and it is your 3500 material, 17-A.

MR. FRIEDMAN: Thank you.

BY MR. PINCUS:

Q I'll repeat the question.

"Question: Now, I understand your testimony is that you don't know whether any customers had actually written in asking to have these orders sent or these charges made?"

Do you remember being asked that question?

A Yes, sir.

Q And do you remember giving this answer, "Right, sir"?

A Yes, sir.

Q All right. So then, as a matter of fact, you don't know whether or not any orders actually came in for the $9.95 offer; isn't that a fact?

15 Neiman - cross - Pincus

A No, sir. No orders came in for the $9.95, sir.

Q So then is it a fact that you weren't telling the truth when you made this statement before the Attorney General?

A No, sir. Not that I wasn't telling the truth.

Q Now, you were a full charge bookkeeper, were you not?

A Yes, sir.

Q And how were the books kept from your point of view, as a bookkeeper? Were they in proper order and so on?

A Oh, yes, sir.

Q Were you in full charge of the books?

A I don'tunderstand what you mean by full charge.

Q Did you handle the books exclusively?

A Basically, yes, sir.

SF fols.

(Continued on next page.)

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CROSS-EXAMINATION

BY MR. PINCUS: (Cont'd.)

Q And you state that the books were kept in good order?

A Yes, sir.

Q Now, were there any unusual checks or checks to cash or anything which would, to your mind --

MR. FRIEDMAN: I object, your Honor.

MR. PINCUS: Let me rephrase.

THE COURT: If you object, you have to stand up.

MR. FRIEDMAN: I'm sorry. I apologize.

THE COURT: What do you object to?

MR. FRIEDMAN: I object to the question on the grounds of relevance.

THE COURT: About checks? What is your question?

MR. PINCUS: I wanted to see --

THE COURT: I couldn't see its relevance but I don't see its harm either.

MR. PINCUS: I'm trying to get at --

MR. FRIEDMAN: We are trying to keep -- I'll withdraw it. I'm sorry.

THE COURT: May I rephrase it? Maybe this will

clear it up.

THE COURT: All right.

BY MR. PINCUS:

Q Were there any checks drawn out by any of the principals in unusual amounts or for cash?

MR. FRIEDMAN: I object.

THE COURT: I will permit it. I don't think it's relevant to the direct examination but I will permit it.

A No, sir.

Q As a matter of fact, all of the monies that came in on the $9.95 offers and other business that the company was conducting, I believe you testified were then drawn out of these Bank Americard and Master Charge accounts and put into the Franklin National regular account?

THE COURT: Just a minute. You started out with all the monies that came in from the $9.95 offer. What do you mean by that? Monies from customers?

MR. PINCUS: The credits.

THE COURT: Or what?

MR. PINCUS: Let me clarify.

THE COURT: She testified, as I understand, that she didn't get any direct $9.95's. Is that right?

THE WITNESS: Yes.

THE COURT: Where do you get all the monies that come in from the $9.95 orders?

MR. RIVERS: Again I except to the Court's question.

THE COURT: I'm sorry but you are overruled.

BY MR. PINCUS:

Q My question is this, you testified, I believe, that all of the monies that were credited to the Bank Americard and Master Charge accounts as a result of the $9.95 offer and any other --

MR. FRIEDMAN: Objection. Charges was the word.

THE COURT: Yes.

MR. PINCUS: I'll use his word.

MR. FRIEDMAN: I believe it was the witness's word, Mr. Pincus.

BY MR. PINCUS:

Q And all other money that came in in the normal course of business, which referred to credit cards, all of that money, I believe, you testified was, with the exception of a small amount, was withdrawn and deposited into the Franklin National regular account, isn't that correct?

A Yes, sir.

Q All right, after it was deposited in Franklin

National account, was it utilized for normal purposes of running the business?

A Yes, sir.

Q During the entire time that you worked there, was that procedure always followed?

A Yes, sir.

Q In other words, this was not a procedure that started with the $9.95 offer?

A Well, we kept a higher balance prior to that in the Master Charge and Bank Americard accounts.

Q But the procedure was always the same during your entire--

A To withdraw the funds, yes, sir.

Q That you worked there? What I am trying to bring out, this was not in conjunction only with the $9.95 offer? This method of doing business?

A Oh, no. I always transferred money.

Q As a matter of fact, that money was needed?

THE COURT: Wait a minute.

A But it wasn't on a day to day basis, no.

Q I don't think I know what that means.

A In other words, we had to build up a certain balance. If I had a $5,000 then I was able to withdraw, leaving $500. We had to have a --

Q You wouldn't do it with very small amounts?

A No. It wasn't a day to day basis.

Q As a matter of fact, when you, as the bookkeeper, paid bills and made up salary checks or whatever, you did it from the Franklin National regular account, did you not?

A Everything on the regular --

Q You never did it from the Bank Americard or Master Charge account?

A Paying bills, no, sir. Oh yes, once.

Q Now, did -- now, you were more or less familiar with the operation there, were you not?

A Yes, sir.

Q How about the processing laboratory, did they process a lot of film? Do you understand?

A Oh, yes.

Q A lot of film? Could you give us a rough idea in hundreds or in thousands or --

MR. FRIEDMAN: What period of time, your Honor, could we focus in on what period of time?

Q Shall we say, between September 1st and November 1st?

A Very little was processed.

Q I see. How much would you say was processed, do you know?

THE COURT: Wait a minute. Are you talking about -- I am sure, 1973?

MR. PINCUS: Yes.

THE COURT: You say from November?

MR. PINCUS: From September 1st, 1973 through November 1st, 1973.

THE COURT: I see.

Q When did you leave the employ of the company?

A Friday after Thanksgiving, in 1973.

Q All right. I'll ask you again then, between September 1st of '73 and the time you left the employ, the latter part of November, was a small amount or a great deal amount of processing done at the plant?

A Very small.

Q Well, do you remember how the film was obtained? Was it mailed in or brought in by customers or how?

MR. FRIEDMAN: Objection, your Honor, on the grounds of relevance. Can we stick to the issues in this case?

THE COURT: Yes. I think we are getting far afield here.

Q Well, I hate to do this, your Honor, but there is another inconsistency.

THE COURT: All right. You have an inconsistency,

if it is, I think it is your duty to bring it out.

MR. PINCUS: Thank you very much.

MR. FRIEDMAN: Your Honor, but is it relevant inconsistency?

THE COURT: We will let the jury -- the jury is a very intelligent group.

MR. PINCUS: I would say relevant only on the question that it might bear on credibility, Mr. Friedman.

THE COURT: All right. Let's proceed. How long are you going to take?

MR. PINCUS: A few more questions, your Honor.

THE COURT: All right.

MR. PINCUS: Of course, we can stop, if your Honor likes.

THE COURT: No. I want to permit this young lady to leave, if possible.

BY MR. PINCUS:

Q All right. Do you remember giving testimony before the Grand Jury here on October 18, 1974?

A Yes.

Q I call your attention to Page 73 of that testimony, Line 3, at the top of the page. Do you remember this question? "During this period in question, from September 21, '70 to the latter part of October, were the bags of mail

containing film coming in every day?"

Do you remember that question?

A Yes, sir.

THE COURT: Can I interrupt you? Did you say '70?

MR. PINCUS: It says 1970.

MR. FRIEDMAN: I would stipulate, your Honor.

THE COURT: That must be '73.

MR. FRIEDMAN: That's a mistake and it's '73.

MR. PINCUS: She wasn't working there in '70.

MR. FRIEDMAN: That should be '73.

MR. PINCUS: I was going to ask Mr. Friedman.

THE COURT: All right.

BY MR. PINCUS:

Q So, question again, "During this period in question from September 21, 1973, to the latter part of October, 1973, were the bags of mail containing film coming over ever day?"

Do you remember that question?

A Yes, sir.

Q And do you remember this answer, "Yes."?

A They were.

THE COURT: They were.

Q The following question, "Approximately?", and

your answer, "Four or five." Now, did you mean four or five mail bags per day?

A Approximately, yes, sir.

Q Would you have any idea of how many rolls of film are contained in each mail bag?

A No, sir.

Q Would you -- from your knowledge, if you know, would you say that four or five mail bags a day would be a substantial amount?

A Yes, sir.

Q Thank you. Now, after you started with the $9.95 offer, did Mr. Mascara ask you at any time about how much had been deposited in the bank?

A He did ask once about our bank balance but that was about all.

Q You are sure of that,that he only asked once?

A Maybe a couple of times but he did ask about --

Q Did he ask you regularly every day?

A No, he didn't.

Q All right. I'm sorry, your Honor.

I call yourattention to the Grand Jury testimony of October 18, 1974 and on Page 53, at line -- Line 11:

"Question: How about Mr. Mascara, did he have any discussion -- did you have any discussion with him

regarding the $9.95 offer?

Do you remember that question?

A Yes, sir.

Q "Answer: No, sir. He only wanted to know how much money we had in the bank at the time."

Do you remember that?

A Yes, sir.

Q All right. And next question, "When was that?" And your answer, "Around the middle of October." All right. Now, coming down to Line 22-- I'm sorry, Line 20:

"Question: Did you show him the bank deposits?

Do you remember that question? And your answer:

"Answer: Every night before I went home, I made a tape as to how much money we had in the checkbook at the time and that is what he saw."

A That's right.

THE COURT: That's right?

Q So then it's not quite true when you say that he only asked you once, maybe twice?

A No, sir. No, sir. You are taking it out of context, sir.

Q I'm taking it out of context?

A Yes, sir.

MR. FRIEDMAN: Can she be allowed to explain, your Honor?

THE COURT: The question was, -- I think the answer was that she -- that Mr. Mascara asked her only once about the bank account.

THE WITNESS: He only asked me about the bank account a couple of times. However, every day I did make a tape and every day I did give a tape as to what our bank balance was. When he saw the tape every day, I didn't show it to him in particular but when he saw it every day, -- but I did make the tape every day.

Q And however you did state in your answer, "Every night before I went home I made a tape," we all understood.

A Right.

Q "As to how much money we had in the checkbook at the time and that is what he saw."?

THE COURT: Yes.

A That would be what he saw. I didn't say he saw it every day, though, sir. Every day I made the tape but he might not have seen it every day.

Q That's what you said at this time.

A That's what I said at that time also, sir.

THE COURT: The question with respect to which, Mr. Pincus, this was supposed --

MR. PINCUS: Mr. Mascara, your Honor.

THE COURT: No. Yours, Mr. Pincus. Your question was, did Mr. Mascara ask about the bank account. She said $9.95 -- after the $9.95 introductory offer and she said well, he asked once about the bank account. Maybe twice. I think she said that.

THE WITNESS: Yes. Once or twice.

MR. PINCUS: Then she ends up by saying that's what he --

THE COURT: Showed him. That's following your question. I think she answered it.

MR. PINCUS: I'm almost over, your Honor.

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Q Now, I believe you testified that you were told Mascara to remove all but $100 in the charge.

MR. FRIEDMAN: Objection, your Honor. It wasn't Mr. Mascara. She testified --

MR. PINCUS: I am sorry. Mr. Seminara. Forgive me.

Q I believe you testified that Mr. Seminara told you on several occasions to withdraw all of the moneys in the credit card accounts with the exception of $100 minimum deposit?

A Yes, sir.

Q Do you know whether or not there came a time when the bank itself -- one of the banks stopped the account when it had $5600 in it?

A Yes, sir.

Q There is another bank that stopped the account when it had $700 in it?

A Yes.

Q Can you explain that to us?

A They froze our accounts.

Q You mean -- But you hadn't drawn the money out?

A I did draw the money out. They bounced the check. They returned the check to us. They will not accept

it.

Q I see.

MR. PINCUS: No further questions, your Honor.

MR. RIVERS: I just want to clarify something.

CROSS EXAMINATION

BY MR. RIVERS:

Q Isn't withdrawing money out of the bank and depositing two separate processes?

A Yes.

Q So the fact that you drew the money out has nothing to do with the fact that you wrote a check on the Franklin National? Do you understand?

A No.

Q You drew money out of the credit account with other banks?

A Yes, sir.

Q And you wrote a check from the Franklin National; is that right?

A No. I wrote-- Where I withdrew the money from, they were checks that were written out. You see, the Bank Americard accounts and the Master Charge accounts, they were check books themselves, and I withdrew a check from there, depositing it into the Franklin National Bank.

Q And Franklin bounced the check?

A No, it wasn't Franklin; it was the account that it was drawn on.

Q That you--

A Which would be the charge account.

Q Well, Miss Nieman, if there was an answer to the $9.95 offer, and the person came in downstairs, and an order was written out and they paid you with a credit card, how would you know about it?

A How would I know about it?

Q Yes.

A If they brought a $9.95?

Q Yes.

A It would have it right on it, when it came up to me, imprinted on it.

Q It would come up to you if the order was made downstairs?

A Yes.

Q Even if a person came in and made a response over the counter?

A It came up to me every day.

Q It would be indicated that the person came in downstairs?

A On the sales slip, I know what they purchase.

Q You wouldn't know whether they came in in

response to an offer or not, would you?

A Yes, I would, because they would have the purchase as an introductory offer. Say a purchase of one roll of 126-12.

Q But you didn't handle the downstairs business?

A No.

Q If the order was to have a certain film developed, and the person came in with a credit card, you didn't handle it downstairs, did you?

A I handled the charge card; I handled the bank. The hard copies, I got them upstairs.

Q You've got it upstairs?

A Right.

Q But how would you know what transpired downstairs?

A By what it says on the description on the sales draft.

Q It would say on the description on the sales draft whether the person came in downstairs or not?

A Yes, it would.

Q Show me on the sales draft--

MR. FRIEDMAN: Here is one. Just one second. There is a hard copy there.

MR. RIVERS: This is a blank.

THE WITNESS: This one here.

Q Show me on this exhibit.

THE COURT: You have to talk louder, too, Mr. Rivers.

MR. RIVERS: Government Exhibit 1-G and 1-H.

Q Show me where it would indicate whether the person came in or didn't come in in response to an offer.

A All right. If they came in, this ould be on the card imprinted. It would have the account number. You know, when they put it through the imprint machine. It would have that, first off. It would also have the signature and their address on the bottom of it. Where it says "Description," it would have -- then it would say, "Introductory mail offer," you know, "$9.95" et cetera.

Q Now, the person called in, where would it indicate that?

A That would say right over cardholder's signature, "Phone order." This would not be typed; this would be written in.

Q Not typed. The fact that it's typed in and the fact that it does not say, "Phone order" indicated that person did not respond to an offer? Is that what you are saying?

A Yes.

Q Every other card other than the $9.95 is typed in?

A No, they are not.

Q That is written in?

A Right.

Q And it says "Phone order"?

A They will say "Mail order" or "Phone order."

Q It will say "Phone order"?

A Phone order.

Q Listen to my question.

A Yes.

Q You are representing to the jury and to this court the fact that the card is typed in and the fact that it does not say "Phone order" that that alone indicates to you that there was not a response to an offer; is that right?

A Yes, sir.

Q So that every other offer other than the $9.95 would be written in and would have "Phone order" written on it; is that what you are saying?

A Or "Mail order."

Q "Mail order" written on it by handwriting?

A Yes. It also tells you what media it came from. It would also say, "Phone" or "Mail order, Modern

Photography," and you would know what media it was.

MR. RIVERS: All right. Thank you very much.

MR. PINCUS: I have one more question, if I may.

CROSS EXAMINATION

BY MR. PINCUS:

Q Miss Nieman, since you kept the books, could you tell us between September 26th and October 28th of 1973 approximately how much money was spent for film and developing paper or photographic paper?

Do you have a rough idea?

A As far as film, gee, I just have to look at my book.

Q All right. Well, would it refresh your recollection if I said approximately $40,000 during that period?

A I don't think that much. Maybe that much. Well, we needed a lot of paper.

Q You needed a lot of paper for what reason?

A To process the film.

Q To process film; isn't that so?

A We were running out of the paper.

THE COURT: But aren't we getting far afield here?

MR. PINCUS: Your Honor--

THE COURT: No.

MR. PINCUS: Your Honor, this--

THE COURT: No, I have been here too long.

MR. PINCUS: But, your Honor, this witness testified that there was very little processing going on.

THE COURT: All right.

MR. PINCUS: It's germane to the--

THE COURT: In that period, she said very little film processing.

MR. PINCUS: And now she testified that there was approximately $40,000 spent for film and paper, and that they needed the paper because they had to process a lot of film.

Now, that is very important, your Honor.

THE WITNESS: Sure, they needed processing.

THE COURT: What?

THE WITNESS: What happened was -- Let me explain.

THE COURT: Tell the jury.

THE WITNESS: They laid off a lot of people in the middle of September. Along with those people went a lot of people from the lab. They stopped developing completely in the lab for a good -- I would

say a good two weeks. Maybe a little more. During which time we were still getting mail bags full of film that had to be developed.

Now, we were lucky that we were able to process film at a rate of speed that we were not too far behind. In other words, if you sent in film, you would get it within a week. You know, when we had paper, et cetera. However, when they laid off a lot of people for a good two weeks, we were without, you know, we were without people to process this film. They began processing with only a couple of people. Then we hired back a few more people. With that we were trying to process a lot more.

Now, as far as the film -- the $40,000 for film and paper, I don't know if that figure is a hundred percent correct. I know we needed a lot of paper, and, plus, we needed film to sell.

Q All right. So then if you needed a lot of paper, isn't it a fact, then, that when you said that they were doing very little processing, that you weren't quite telling the truth?

A No, I was telling the truth. They were still doing processing. They weren't working at full capacity.

Q What was full capacity for that plant, do you

know?

A Full capacity for the machines?

Q Yes.

A Sure. They would have two and three rolls of paper coming out of the printing machine. Two printing machines running.

Q As a matter of fact, is full capacity for that plant 10,000 rolls of film per day?

A Approximately. I would--

MR. PINCUS: No further questions.

MR. RIVERS: Your Honor, I have--

THE COURT: Well, now, we can't keep this up.

MR. RIVERS: I'm sorry, your Honor, but every time a question is asked something else develops.

THE COURT: I know.

MR. RIVERS: Will you mark this for identification?

THE COURT: Now let's try to limit this so that we can go to lunch. I mean, it's been a long process.

THE CLERK: Document marked Defendant's Exhibit M.

(So marked)

THE COURT: Maybe we will go to lunch first

and then come back.

MR. RIVERS: I think this will be very short.

THE COURT: All right, we will try.

THE CLERK: The document is dated 6/13. It is a Bank Americard.

THE COURT: All right, that's for identification.

CROSS EXAMINATION

BY MR. RIVERS:

Q Will you tell me what this is, Mrs. Nieman?

A This is a slip.

Q Is it for the Bank Americard?

A Yes, Bank Americard.

Q Can you tell me whether or not that represents an order at the Foto Factory?

A I can't read what it says. Camera charge.

MR. FRIEDMAN: I ask that the--

MR. RIVERS: I didn't--

MR. FRIEDMAN: There has to be a foundation.

MR. RIVERS: Is this an objection?

MR. FRIEDMAN: That's an objection. I think she should be asked--

MR. RIVERS: Whenever I begin to ask a question--

THE COURT: No. We are not going to generalize. We are going to have this bickering stopped.

All right, sit down, Mr. Friedman.

MR. FRIEDMAN: Yes.

Q Will you tell me whether that is an order for Foto Factory?

A Yes.

Q First of all, tell me what media that came from?

A Modern Photography.

(Continued on the next page.)

JB#2

Q It came out of Modern Photography?

A I believe so. It looks like Modern Photography. Either mail order or Modern Photography. I am not sure what she did with it.

Q You are not sure. Is your answer you are not sure?

A My answer is yes, I am not sure if that is mail order. No, it is not. Could be mail order.

MR. RIVERS: All right, I have nothing further.

THE WITNESS: I think it's mail order.

MR. RIVERS: I have no further questions.

May I have the exhibit?

THE COURT: Wait a minute. Has this been introduced in evidence?

THE CLERK: No.

MR. FRIEDMAN: That was the basis of my objection, your Honor.

May I see it, please?

THE COURT: Well--

MR. FRIEDMAN: Your Honor, may I see the exhibit?

MR. RIVERS: I didn't offer it in evidence.

THE COURT: Let him see the exhibit.

REDIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Is this a sales slip for a camera charge?

A Yes, it is.

MR. RIVERS: I object to that. I never asked what it was. It's improper redirect.

I never asked what it was a slip for. This young lady testified as to how she could tell the difference.

THE COURT: I think it's perfectly proper. We want to find out what this is and what we are talking about.

What is it?

THE WITNESS: For a camera order.

THE COURT: Camera.

We were talking about film orders, weren't we?

THE WITNESS: We also sold cameras.

THE COURT: All right.

THE WITNESS: Photo equipment and flashes and whatnot.

THE COURT: Camera?

THE WITNESS: Yes.

Q Mrs. Nieman, the film that was coming into the old bags, was that film that had been sent in prior to your depositing these $9.95 charges?

A In the beginning, yes, sir. I don't know if any of them came in that were generated from the $9.95s. This I can't tell you. They didn't have any marks on them.

Q Now, the procedures that you outlined with respect to the coupons that would come in for mail orders and clipping those to the merchant's copies, you retain all of those procedures that Mr. Rivers asked you about? Were those the general procedures that would ordinarily be followed in the ordinary course of business of Foto Factory?

A This was the procedure we were supposed to follow.

Q Was that procedure followed with respect to the $9.95 charges?

A As far as what it was generated from--- I don't understand that question.

Q In other words, were there any coupons that were attached to the merchant's copies for $9.95 charges?

A There were none.

Q Now, prior you testified that there were several employees who were laid off on or about September 15, 1973; is that correct?

A Yes.

Q Was the company in bad financial shape on

September 15, 1973?

A Yes, sir.

MR. FRIEDMAN: I have no further questions.

THE COURT: I have one.

MR. RIVERS: I have one also.

THE COURT: I am sure.

You said there was very little film work donw between September, I think the 23rd, and October 21st.

MR. FRIEDMAN: September 21st and October 17th.

THE COURT: And October 17th.

THE WITNESS: Film orders.

THE COURT: Film orders. But you also had previously testified that there was $40,000 worth of paper.

THE WITNESS: That's for processing of the film. In other words, you know--

THE COURT: You were talking about film orders?

THE WITNESS: I am talking about new orders coming in where somebody would say they would like to buy twelve rolls of film.

THE COURT: There were very few film orders?

THE WITNESS: New orders coming in.

THE COURT: But nevertheless, you had the paper for the processing?

THE WITNESS: We needed processing.

THE COURT: What processing were you doing if there wasn't any film orders?

THE WITNESS: In other words, when you bought film from us, you also got mailers, so when you have people that bought twelve or thirteen rolls--

THE COURT: Before?

THE WITNESS: -- before, and they were sending them in -- they were finished.

THE COURT: You weren't talking about new film orders?

THE WITNESS: No.

THE COURT: But old film orders were coming back in the mailers?

THE WITNESS: The old ones, yes, sir.

THE COURT: Yes.

Now, you have a question?

MR. RIVERS: Yes, your Honor.

RECROSS EXAMINATION

BY MR. RIVERS:

Q With regard to the example that was shown to you by the U.S. Attorney, you said the yellow copy was the copy that should be put in with the order.

A What do you mean?

Q The yellow copy was a copy for the customer to be put in with the customer's order?

A No, no.

Q Which copy is that?

A The tissue copy.

Q You said that always was put in with the order as the requirement to be done.

A As a rule, yes, sir.

Q Not as a rule. That was a requirement to be done?

A Well, when they bought film--

Q If I told you that Pat Hughes was the man who runs this for the Chase Manhattan Bank and he indicated that that is not a requirement--

THE COURT: Wait a minute. Is there testimony--

MR. RIVERS: That was the testimony.

MR. FRIEDMAN: Yes.

MR. RIVERS: That was his testimony.

MR. FRIEDMAN: He testified about the practice of Foto Factory.

MR. RIVERS: Is this an objection?

MR. FRIEDMAN: Yes. Objection.

MR. RIVERS: I withdraw any--

THE COURT: All right, any further questions?

MR. PINCUS: No.

THE COURT: Mr. Friedman, any further questions?

MR. FRIEDMAN: No, your Honor.

THE COURT: The clock has nothing to do with it.

MR. FRIEDMAN: No further questions.

THE COURT: All right. We will have an adjournment now until 2:40. I will be here.

Gentlemen, do you think you can be back at 2:30?

Yes, an hour. Why don't we start at 2:30?

MR. RIVERS: We are at a disadvantage. Can I come to the side bar?

(The following took place at the side bar.)

MR. RIVERS: We have a witness standing by. I don't know if he is finished with--

MR. FRIEDMAN: I have one more witness. But we are going to ask for an offer of proof with respect to the witness which we believe to be an accountant.

THE COURT: That will be immediately-- That will be as soon as you come back?

MR. FRIEDMAN: We have--

THE COURT: As soon as we come back from lunch.

MR. FRIEDMAN: As soon as we come back from lunch the Government has one more witness to call who will take five minutes on direct.

THE COURT: Then you want to make an offer?

MR. FRIEDMAN: Then we will rest. And they are going to call their first witness. And then we are going to ask for an offer.

MR. RIVERS: I object.

THE COURT: I don't understand that. He is going to call for a witness. How can you ask for an offer of proof?

MR. FRIEDMAN: Your Honor, Mr. Rivers and Mr. Pincus have indicated that they are going to call an accountant who is going to put in a report.

MR. RIVERS: No. I am putting inhis testimony.

THE COURT: They think they can try, and I will assure you that I will act in accordance with the Rules of Evidence as I see fit.

MR. FRIEDMAN: Your Honor--

THE COURT: I don't understand what you are talking about.

MR. FRIEDMAN: All right. Your Honor, I think the jurors may be wondering why Mrs. Schwartz isn't here. Will you announce that she is not well.

THE COURT: I don't think it makes any

difference.

All right. Do you think--

MR. PINCUS: Yes, 2:30.

THE COURT: All right, it will be 2:35 by the time you fellows get out of here.

(End of side bar.)

THE COURT: All right, see if we can get back at 2:30. Please do not discuss the case.

(Luncheon recess taken.)

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AFTERNOON SESSION

(Time noted: 2:30 p.m.)

THE CLERK: Government Exhibit 71, letter contents, Jules & Stern, marked.

(So marked, for identification.)

THE COURT: Bring the jury in.

MR. FRIEDMAN: I have one request to make to expedite the trial. I am not using the word application any more.

THE COURT: I know, but you are taking my time.

MR. FRIEDMAN: Your Honor, Title 39, Section 3009 provides unsolicitated mail matter does not have to be returned and I would like the Court to take judicial notice of this under the new Rules of Evidence.

THE COURT: Where is that?

MR. FRIEDMAN: Title 39, I have it here, your Honor.

THE COURT: Why didn't you do this before? I am not going to come in every morning and every afternoon and have applications. I cannot put the jury on if you have application after application. What is the purport of this?

MR. FRIEDMAN: To show under this statute that the previous customers were not getting anything

of value because they did not have to pay for it.

THE COURT: Is this applicable to this afternoon's hearing or to something else?

MR. FRIEDMAN: Your Honor, I raised the question because I am not sure of whether the Court should read this to the jury before the Government rests or whether it can be -- in other words, whether it has to go in out case.

THE COURT: Let me see. Where you have the mark?

MR. FRIEDMAN: Yes, Section 3009.

THE COURT: Well, I do not know how it comes up now. It comes up in the charge, does it not? You better tell me in what context you bring it to my attention, that is Section 3009 of Title 39.

MR. FRIEDMAN: In the context, your Honor, of the testimony that the previous customers did not order these mailers therefore under that statute they were not receiving under the law anything of value that they had to pay for or do anything with.

THE COURT: Well, that comes up in the instructions, not now.

MR. FRIEDMAN: Well, I just wanted to raise it with the Court at this time.

THE COURT: I cannot see how it comes up now,

do you? If it came up now I would still have to instruct the jury with respect to this section, is that right?

MR. FRIEDMAN: I believe your Honor is correct, that on second thought that it is a question of law.

THE COURT: All right, let us bring in the jury.

(The jury took its place in the jury box.)

THE COURT: Have you another witness?

MR. FRIEDMAN: Yes, your Honor, the Government calls Mr. Libasci.

F R A N C I S J. L I B A S C I , called as a witness, having first been duly sworn by the Clerk of the Court, took the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Mr. Libasci, what do you do?

A I am chief accountant, Rockville Centre Post Office.

THE COURT: Now that we have the microphone on, you do not have to speak so close to it.

Q Mr. Libasci, were you so employed in 1973?

A Yes.

THE COURT: Chief accountant of what?

THE WITNESS: Of the United States Post Office, Rockville Centre.

BY MR. FRIEDMAN:

Q And Mr. Libasci, in the course of your official duties, did you become involved with postage meters?

A Yes.

Q Are you familiar with the company known as Foto Factory Limited?

A Yes.

Q With respect to postage meters, does each postage meter in existence have its own number?

A Yes.

Q And will you please tell the ladies and gentlemen of the jury how a company -- what steps a company has to take to get permission from the Post Office to use a postage meter?

A There is an application that they have to fill out and file with the Post Office and then the postage meter is assigned by one of the authorized companies, in this particular case, Pitney-Bowes, and then the firm has to bring the postage meter to the Post Office for setting and it is set with a certain amount of postage which is paid in cash at that particular time by the firm and as the postage is used from the meter there is a descending register

reading on the meter which indicates the amount of postage that is run off the meter for the amount.

Q Are you familiar with the postage meter number used by Foto Factory Limited?

A Yes, I am.

Q In 1973?

A Yes, I am.

Q What is that number?

A PB147003.

Q And the postage meter that they used as all postage meters in existence, do they cancel as well as put stamps on simultaneously?

A Yes, the postmark date.

Q Do you have an envelope before you?

A Yes, I do.

Q What exhibit number is that, please?

A Exhibit number 71.

Q Government Exhibit number 71 for identification. Will you please look in the right-hand corner and tell us whether the postage meter appears on that envelope?

A Yes.

Q What is the number?

A PB147003.

Q And did you see that envelope today for the

first time?

A Yes, I did.

Q Who gave it to you?

A Inspector Krusala.

Q Was that during the lunch break?

THE COURT: PB14700 --

THE WITNESS: 003.

Q You know whose number that is?

A Yes, that is assigned to Foto Factory, or was assigned to Foto Factory.

Q Are the rules and regulations or practice of the Postal Service such, or, does the Postal Service deem an envelope to have been mailed if it has a canceled postage meter on it?

A Yes.

MR. FRIEDMAN: At this time I would like to offer in evidence Government Exhibit 71, an envelope.

MR. RIVERS: May I have a voir dire, your Honor?

THE COURT: Yes. May I look at it first so I will know what we are talking about.

(continued on next page)

VOIR DIRE EXAMINATION

BY MR. RIVERS:

Q Mr. Libasci, once an envelope is accepted at the Post Office, it is deemed mailed?

A Yes.

Q So that it is not only the requirement that the postal meter is written across, but it be accepted at the Post Office also?

A Yes.

Q Can you tell us, based upon observing this letter that you are looking at, whether or not it was ever accepted at the Post Office?

A Looking at it, it is hard to make that assumption.

Q You cannot say that, is that right?

A Yes.

MR. RIVERS: I object.

MR. FRIEDMAN: I would like to ask one further question if I may, your Honor.

THE COURT: Go ahead.

(continued on next page)

Libasci

DIRECT EXAMINATION

BY MR. FRIEDMAN (continued):

Q Is there a presumption within the Postal Service with respect to envelopes that have postage meter numbers on them as to whether they in fact were mailed or not?

A Yes there is.

Q What is that presumption?

A That once it is accepted it is considered mailed.

Q You testified, when Mr. Rivers asked you if that envelope was in fact accepted, and you stated there is no way you could tell it was accepted. I am now asking you, in those cases where you have an envelope that has the postage meter on it and a cancel issue on it and you do not know whether it is a fact it was given to the Post Office for mailing, whether there is a presumption in the Postal Service as to whether that envelope was mailed?

A Yes there is.

Q What is the presumption?

A That it has been mailed.

Q So does it have to be -- does the Post Office have to know it is accepted?

A No.

Q For mail?

A No, it is not a requirement.

Q So the postage meter holder,in this case Foto Factory Limited, were they charged for that envelope?

A Yes, they were.

MR. FRIEDMAN: I renew my offer.

MR. RIVERS: I am going to object, based upon the fact that the witness changed his testimony.

THE COURT: He did not change his testimony.

MR. RIVERS: He said he did not know if it was accepted by the Post Office.

THE COURT: I will let the jury decide whether it was mailed. It is going to be admitted in evidence on the testimony.

MR. RIVERS: May I point out to the Court there is nothing in the evidence, no indication to point out what is in it.

THE COURT: It does not have to be. It is admitted in evidence. The jury can decide how much weight they are going to give to it, but here is an envelope with a postal meter mark with a eight cent discharge on it paid by Foto Factory with their number on it. This man testified under the circumstances there is a presumption in the Post Office

that it has been accepted and received at the Post Office. Is that correct?

THE WITNESS: That is correct.

THE COURT: It is admissible in evidence.

THE CLERK: Government Exhibit 71 so marked, in evidence.

(So marked.)

MR. RIVERS: May I ask the Court to take a close look at this envelope?

THE COURT: All right. You mean something up there in the left-hand corner?

MR. RIVERS: No, because of the back.

MR. FRIEDMAN: Your Honor, may I call the Court's attention to the fact that various envelopes had writings on them from the people who received them.

THE COURT: We had excised that from the envelopes by putting those over on them just as it was done in the frying pan statement.

I think Mr. Friedman agreed it did not have this on the back.

MR. RIVERS: I did not hear that question put. Did it have anything in it at the time.

THE COURT: I do not know.

MR. RIVERS: Or have something in it now, I do not know.

THE COURT: Well, I think you are right. He is only offering the envelope, Mr. Rivers. What is in it is not going to come in unless he develops it. He is only offering the envelope.

MR. FRIEDMAN: I ask the contents be taken out of the envelope and it is not offered in evidence.

THE COURT: And I understand that the piece of white paper or bluish paper on the back was not on the envelope at the time it was metered, is that understood?

MR. FRIEDMAN: Yes. I would like to call to the Court's attention --

THE COURT: Is that understood?

MR. FRIEDMAN: Yes, your Honor. There are several in which a piece of blue paper was put over writing that was caused or possibly placed on these envelopes after they were mailed out by people other than Foto Factory Limited.

MR. RIVERS: Can we see them before they are redacted? Can we see the contents?

MR. FRIEDMAN: We can take them out and he can see them.

THE COURT: Yes, I think you are right. I think you have a right to see them.

MR. FRIEDMAN: Shall we have a recess?

THE COURT: Keep going. Is this your last witness?

MR. FRIEDMAN: Yes, your Honor. In fact, I have no further questions of this witness. I would like at this time to offer in evidence Government's Exhibit 15, 17, 22, 23, 30, 32, 38, 42, 43, 44 and 46, all Xerox copies of envelopes that Mr. Schroeder previously testified appear to be copies of envelopes.

THE COURT: They have nothing to do with this witness' testimony?

MR. FRIEDMAN: No, your Honor.

THE COURT: Let us stick to this witness and to the envelope we are now concerned with. Can you take off that piece of paper right now? I do not want to take a recess.

MR. FRIEDMAN: Yes, I can.

THE COURT: And then put it back if need be.

MR. LENT: If it please the Court, at this time we would object to this going into evidence unless the blue slip were removed and the envelope submitted exactly with all the writing which appears

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to be from the person who received it.

THE COURT: Let me see it.

MR. LENT: I think it would be unfair otherwise because it only gives a partial story.

THE COURT: No, I do not think so at all. It has only been offered that it was mailed out. I think this is simply confusing.

MR. FRIEDMAN: Your Honor, may I call to the Court's attention, as well as defense lawyers', that there are other envelopes that have writing on them and we have covered them up because there was no testimony as to who in fact put the writing on. Are we going to take it off this one and not others?

THE COURT: No, we are not going to take it off any of them. Put it back on. Objection overruled.

Let us proceed.

MR. RIVERS: Exception, your Honor.

MR. LENT: Exception, your Honor.

THE CLERK: Government Exhibit 71 received in evidence.

MR. FRIEDMAN: I have no further questions of this witness.

THE COURT: Is there any cross-examination?

MR. LENT: No questions.

Libasci

MR. RIVERS: No questions.

14 THE COURT: Thank you very much, Mr. Libasci.

(Witness excused.)

THE COURT: You made some offers before?

MR. FRIEDMAN: At this time, I renew my offer and for brevity's sake, I believe Madam Reporter has the numbers of the exhibits that the Government again moves to offer in evidence that Mr. Schroeder testified were Xerox copies of original envelopes that he prepared in connection with the 995 mailers that in fact were mailed.

MR. LENT: I will object.

THE COURT: Did he testify he could not find the originals?

MR. FRIEDMAN: No, your Honor, he did not.

MR. LENT: He also testified that they appear to be, your Honor, he was not absolutely definite.

THE COURT: I think that is true of all the testimony. That objection is unsustainable. Are you offering these under the new rules?

MR. FRIEDMAN: Yes, your Honor, they are being offered under Article 10 of the new Rules of Evidence.

THE COURT: Can we read it again?

MR. FRIEDMAN: Article 9, I stand corrected -- I am sorry, Article 10 of the Rules of Evidence.

THE COURT: Yes. Well, it gives the definition, but it does not say whether it is admissible.

MR. FRIEDMAN: I am sorry, your Honor?

THE COURT: This simply gives the definition. It does not go any further.

MR. FRIEDMAN: I believe I can call the section to the Court's attention.

I direct the Court's attention, if I may, to 1003, Section 1003.

THE COURT: Let me see those exhibits being offered. I will permit them.

MR. RIVERS: May we see the exhibits before they are permitted in evidence?

THE COURT: Yes.

MR. RIVERS: May we at this time have a side bar for just a minute?

(Whereupon a side bar was held without the hearing of the jury as follows:)

MR. RIVERS: I call the Court's attention to the fact, these have no meters on them at all, they are not discernable at all. I would like to point out to the Court that the rule of evidence quoted by

counsel has to do with the rule that if the photostats which are copies of the actual originals are admissible in evidence that there is no way that a piece of paper such as this can be an exact duplicate of anything because it is only a piece of paper.

THE COURT: Well, it could be. You do not have any testimony to that effect, but it could be.

Just a moment, I want to look at that. We would have to look at Schroeder's testimony and see what he said.

MR. RIVERS: In addition, the rule of evidence speaks about photostats, these are not photostats, these are different.

THE COURT: They say copies of. I am not worried about that, that is a technical matter.

MR. RIVERS: This does not say meters. This one you can't tell if it is an envelope.

MR. LENT: There is no meter number at all, there is nothing on it and another and another one, nothing, nothing.

THE COURT: Let us separate them. This is not exactly nothing.

MR. RIVERS: You cannot tell that these are mailed items.

THE COURT: What did Schroeder say?

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MR. FRIEDMAN: If I may be heard, Mr. Schroeder testified that he had envelopes of Foto-Max and Foto Factory Limited and that he taped on the number and address on each one he got and he mailed them out and these all appeared to be the ones that he prepared.

THE COURT: What did he say, that he did not have the originals?

MR. FRIEDMAN: No, the originals, your Honor, would be in the hands of the consumers.

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THE COURT: Where did he get the photostats?

MR. FRIEDMAN: There were sent to the Postal Inspector.

THE COURT: This is not enlightening. The originals were in the hands of the consumers, and he got photostats of the originals. Just let me do it step by step, I am very stupid.

MR. FRIEDMAN: To that I would take exception, your Honor.

THE COURT: Where did he get the photostats from, the originals, how did he get them?

MR. FRIEDMAN: Mr. Schroeder never had them, the Postal Inspector Krusala had them.

THE COURT: The Postal Inspector out there in the court?

MR. FRIEDMAN: Mr. Krusala is seated at the table, from all those people who complained.

THE COURT: How did he get them?

MR. FRIEDMAN: They complained to the local Postal Inspectors.

THE COURT: Did he go out and make photostatic copies?

MR. FRIEDMAN: No, the local Inspector sent them on to Mr. Krusala.

MR. RIVERS: Why can we not call the Postal In-

spectors for the originals?

THE COURT: This is not clear to me. The local Postal Inspector from whom he got the photocopy, he got it from Lawrence H. Tomlinson?

MR. FRIEDMAN: Yes.

THE COURT: Why didn't he get the originals.

MR. FRIEDMAN: I am not sure, your Honor. The law does not require, where you have the explanation where the original is --

THE COURT: I would not go as far as that. He has to say he does not have the originals. He said they were sent out.

MR. FRIEDMAN: The rule provides --

THE COURT: Forget the rule, I read the rule. The envelopes are unavailable, that is enough. You do not have to read the rule. What bothers me is that we have here testimony that he said that he mailed these out, the originals.

MR. FRIEDMAN: Yes.

THE COURT: And he said he mailed these and Mr. Rivers says if he mailed them --

MR. FRIEDMAN: Well, you cannot make out the meter number on some of them.

THE COURT: This is the worst of all. I think obviously there is a meter number on this of some kind

We have had Foto Max which was testified to the jury, and they can make such inferences as they wish. The fact that it has little weight does not mean it is not admissible.

MR. FRIEDMAN: Mr. Schroeder said it appeared to be copies of what he mailed.

THE COURT: Well, I suppose the very names can be found in the customer lists of Foto Factory.

MR. RIVERS: Well, we have the frying pan situation --

THE COURT: The frying pan has nothing to do with this.

MR. LENT: Wouldn't the fact that if the copies were made from the originals, then the originals were available?

THE COURT: No, if they are out in Illinois, in Maine, Quincey --

MR. LENT: Well, if they sent them in.

MR. RIVERS: We do not necessarily want to see it today.

THE COURT: No, we are not going to do that.

What about this testimony, would he say he got them from the local post offices?

MR. FRIEDMAN: From the local Postal Inspector, or the consumer complaint.

THE COURT: From whom?

MR. FRIEDMAN: From the consumer complaint.

THE COURT: Well, then, he got them from the local Inspector. Put him on the stand.

MR. FRIEDMAN: May I have a moment to ask him?

THE COURT: Put him on the stand.

(Whereupon, the side bar was concluded.)

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(continued on next page.)

MR. FRIEDMAN: Your Honor, at this time the Government calls -- the Government will hold in abeyance its motion to have these exhibits offered in evidence and will call Inspector David Krasula.

D A V I D A. K R A S U L A, called as a witness, after being duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. FRIEDMAN:

Q Inspector Krasula, are you employed by the United States Postal Service?

A Yes, sir. I am employed by the Postal Inspection Service.

Q I see. And is it part of your duties to investigate cases in which the mails are used in a fraudulent manner?

A Yes.

MR. PINCUS: Objection.

THE COURT: Well, in which there is a claim of some violation of the postal regulations?

THE WITNESS: Yes, sir.

Q And did you conduct an investigation with respect to Foto Factory Limited and a $9.95 introductory offer?

A Yes, sir, I did.

Q Will you please look at Government Exhibits for identification: 15, 17, 22, 23, 30, 32, 38, 42, 43, 44 and 46. I believe there are 11. They are photostatic copies.

A Yes, sir. There are 11 photostatic copies here.

Q Did you see all of those 11 before?

A Yes, sir, I have.

Q And willyou tell the ladies and gentlemen of the jury under what circumstances you saw them before?

A As a result of a questionnaire that I sent to the different individuals whose names and addresses appear on these photostatic copies. These items were returned to me. The photostats were returned to me by the addressees, and indicating that they had been the recipient of these items.

Q Did they indicate to you that they received them from Foto Factory Limited from the United States mails?

A They invoiced -- they indicated that they had received the originals of these documents from Foto Factory Limited through the U. S. mails.

MR. FRIEDMAN: I have no further questions.

I would like to offer them in evidence at this time.

THE COURT: All right. Any questions?

MR. RIVERS: I would object. First of all,

let me find out if Mr. Krasula made the copies that are before you.

CROSS-EXAMINATION

BY MR. RIVERS:

Q Did you?

A No. They were made by the addressees.

Q Can you say whether or not the copies are an exact duplicate of what was in the possession of the addressees?

A Based on my observations of similar envelopes, these appear to be an accurate reproduction of what these individuals received.

Q I didn't ask you that. I asked --

THE COURT: Well, it's -- no. It's very simple. I am not going to waste too much time here.

Let me ask you this. You called up the addressees.

THE WITNESS: I wrote all these people a letter.

THE COURT: All right. And you asked them for photostatic copies of the originals?

THE WITNESS: Yes, sir. I asked them for the originals or a photostatic copy.

THE COURT: In a letter or by phone?

THE WITNESS: In a letter.

THE COURT: And in response thereto you got these?

THE WITNESS: Yes, sir.

THE COURT: All right. Well, we will let them -- do you have anything to say, Mr. Pincus?

MR. PINCUS: No, thanks, your Honor.

THE COURT: We will put them in evidence. It is admitted in evidence. It is up to the jury to give such weight to them as they deem advisable.

MR. RIVERS: I object.

THE COURT: Yes.

THE CLERK: Government Exhibits 15, 17, 22, 23, 30, 32, 38, 42, 43, 44 and 46, marked in evidence.

THE COURT: All right, what is the next --

MR. FRIEDMAN: I have no further questions of Inspector Krasula.

THE COURT: Any further questions of Inspector Krasula, gentlemen?

MR. RIVERS: I intend to call Inspector Krasula.

THE COURT: Well, he is here.

MR. RIVERS: Can I continue asking him --

THE COURT: I think you'd better let the Government say whether it rests first and then call Inspector Krasula at a later time.

All right, you can sit down. Please leave the stand, Mr. Krasula.

(Witness excused.)

MR. FRIEDMAN: At this time, your Honor, and ladies and gentlemen of the jury, the Government rests.

THE COURT: All right. That's your case.

MR. FRIEDMAN: Yes, sir.

THE COURT: Do you wish to make any applications?

MR. PINCUS: At this time, your Honor --

THE COURT: Outside the presence of the jury.

MR. RIVERS: Yes. I would like to.

THE COURT: All right. Then we will excuse the jury for 5 or 10 minutes while applications are being made.

(Whereupon, the jury retired from the courtroom.)

MR. PINCUS: If your Honor please, I had intended to make a motion at this time to dismiss for failure to having proved a prima facie case. The only thing is I have spent some time preparing a memorandum of law which is now being typed in my office. And I would like very much when I make that motion to submit to your Honor the memorandum of law. And I was wondering whether to reserve my right to make that motion.

THE COURT: No. You make the motion now and I

will reserve decision.

MR. PINCUS: I appreciate that.

THE COURT: Not because the Court wishes to reserve decision, but at your request -- and inasmuch as you say you think you have a brief which might persuade me --

MR. PINCUS: Yes, I do.

THE COURT: All right.

MR. PINCUS: Then in that case I will officially move to dismiss each and every count of the indictment at this time based upon the fact that the People have failed to prove a prima facie case with respect to each and every one of the counts in the indictment.

THE COURT: Yes.

MR. PINCUS: They have failed to prove intent, failed to prove a common plan and scheme to use the mails with respect to perpetrating a fraud, which is a necessary element pursuant to the sections involved here.

THE COURT: How about you? Are you finished?

MR. PINCUS: Yes, I am.

And may I say -- excuse me one moment.

I would appreciate your Honor withholding any decision on that motion to give me --

THE COURT: In fact, you are requesting that.

Because ordinarily it's a little unfair to a defendant -- if there is a real reason for dismissing a complaint -- to require him to go ahead and put in evidence if he intends to do so just because the Court has reserved decision and will not make that decision.

MR. PINCUS: Of course, if your Honor wants to grant my motion at this time --

THE COURT: Well, all right. We can act promptly.

I am very familiar with I think the evidence and I believe the testimony. So I think I could make the decision now. But I will leave it to Mr. Rivers.

If you have -- if your brief is predicated upon law only, I don't know that I would hold out too much hope for you, Mr. Pincus. If it is predicated upon failure of the Government by reason of certain testimony to prove its case, then I'd like to look at it.

MR. PINCUS: It's a combination of both, your Honor.

THE COURT: All right. We will get that. When canyou get it in?

MR. PINCUS: I had hoped it would be --

THE COURT: Today some time?

MR. PINCUS: I can't get it in today, your Honor. I might be able to submit it tomorrow because of the fact that my office is out on Long Island. And when I called in at lunch time they were typing it.

THE COURT: All right. How about tomorrow?

MR. PINCUS: I will try.

THE COURT: You can't keep on trying. There is a limit that I have, too. You have to get your instruction requests to charge in, Mr. Rivers and Mr. Pincus and Mr. Friedman, in at least one full day before the Court charges. Otherwise I will not take it. Is that understood?

MR. PINCUS: Well, your Honor, the only reason I say that I am not certain is because I'm hopeful that they didn't make any typographical --

THE COURT: I am talking about the charges.

MR. PINCUS: The charges.

THE COURT: Your requests to charge. You'd better get those in.

MR. PINCUS: Yes.

THE COURT: At least one full day.

All right, Mr. Rivers, what do you have to say?

MR. RIVERS: I intend to submit a brief also.

THE COURT: This is most unusual. Both cases. This is most unusual.

Make your application right now. The Court looks at it and listens to the argument. I will take the brief, but I won't take any more argument.

MR. RIVERS: Your Honor, I had no way of knowing when the Government would be finished.

THE COURT: That's true in every case. But you can guess and you know pretty near --

MR. RIVERS: Your Honor --

THE COURT: No, this is nothing unusual, Mr. Rivers. I've tried many, many mail fraud cases, too. They have no trouble. The defendants have no trouble in making the required motions.

MR. RIVERS: I have made the brief, your Honor. It's just a matter of having it typed up --

THE COURT: All right.

MR. RIVERS: (Continuing) -- this morning.

THE COURT: Now, I will look it over very carefully and look at the cases and I will come in and give a decision. I'm not going to take an awful lot of time to argue. You already had an opportunity to argue in your brief. And now --

MR. RIVERS: Your Honor, I -- this morning I did not go to my office. I had to be here at 8 o'clock in order to read the minutes. I was here. I stayed in New York in order to be here. Therefore,

I don't have the brief. The brief is probably in my office typed. I can make the motions, however.

THE COURT: You can make the -- make the motions now.

MR. RIVERS: Yes. With regard to the motion, I move at this time to --

THE COURT: You know the testimony I think or should know it very thoroughly.

MR. RIVERS: I do.

THE COURT: All right. Then make the motion.

MR. RIVERS: That's what I am trying to do.

THE COURT: In what respecthas the Government failed to prove --

MR. RIVERS: One of the elements is to prove a scheme, a device, something underhanded.

THE COURT: A scheme?

MR. RIVERS: A scheme.

THE COURT: Well, whether a scheme is underhanded or overhandad, I don't care. I don't care whether it's underhanded or where it is. A scheme is a scheme.

MR. RIVERS: Yes. And also intent, your Honor.

THE COURT: Well, that is important.

MR. RIVERS: Which, of course, is an indication

of -- in fact, most of the Government's case negates intent.

THE COURT: Negates?

MR. RIVERS: Negates intent. There is no indication here of intent.

THE COURT: Well, now, why does it negate intent?

MR. RIVERS: Well, basically because the testimony thus far is as to whether or not the People -- that is, the defendants had the right to use -- first of all, to be a mail order house, as to what their floor limits were. They have been several versions of this.

First of all, the first man from the bank indicated that the floor limit was $35. Then he said -- he admitted the contract says $50. Then there was some indication that there was no computers involved in this process. There are indications throughout the case that the computers were used. As a matter of fact, there are indications through the Government's own witness that another computer company was involved, and an indication from the Government, Mr. London, that there was a complaint by Dominick Seminara to him that he was not satisfied with the computer, and that he had done some work for him and --

THE COURT: Mr. Rivers, isn't that all irrelevant?

MR. RIVERS: No.

THE COURT: Isn't it? Well, what --

MR. RIVERS: No. It bears on intent.

THE COURT: Wait a minute. The real intent here, according to the Government's testimony -- I don't know whether the jury is going to believe it or not -- is that these people -- these defendants mailed out to certain card holders a pre-mailer, and then without their consent charged them $9.95.

MR. RIVERS: Is that enough?

THE COURT: That's intent.

MR. RIVERS: The mere fact that they proved that a mailer was sent out --

THE COURT: Without permission of the --

MR. RIVERS: But it wasn't sent out to the public at large. It was sent out to a group of customers.

MR. FRIEDMAN: Only 12,000.

MR. RIVERS: Is there -- this is constant.

MR. PINCUS: There is no --

THE COURT: All right, don't get upset.

MR. RIVERS: I get upset because I don't do that. And I've learned that in trying cases for 15 years that you don't do that.

THE COURT: All right. Why isn't it intent?

MR. RIVERS: Because the mere fact that -- your Honor, if the Government merely had to prove that a mailer was mailed out and that the -- based upon it being mailed out the customer was charged and they had no opportunity and no availability of having been credited -- and the Government's own witness indicated that they had from 1 to 25 days to have themselves credited if they did not want the mailing. The Government tried to indicate there was no -- this was a covert scheme. It was a covert scheme.

So if it was a covert scheme, why was there advertising in the newspapers? If it was a covert scheme, why was the address of the company given? If it was a covert scheme, why were the corporation's officers available.

THE COURT: There doesn't have to be a covert scheme. It doesn't have to be a covert scheme at all.

MR. RIVERS: You have --

THE COURT: It's out in the open.

MR. RIVERS: What would happen right now if I say I am going to rest on the Government's case? Would the Government have proved beyond a reasonable doubt the intent to defraud based upon the testimony here?

THE COURT: That's entirely up to the jury. I certainly would I think let it go.

MR. RIVERS: Would it go to the jury based upon the Court's obligation to make a ruling on the law alone?

THE COURT: Don't worry.

MR. RIVERS: Based on the Government's case that they proved beyond a reasonable doubt --

THE COURT: Yes. Yes, indeed.

MR. RIVERS: I don't think so. Because all mail schemes and all mail frauds that I have been able to read had something to do with the device whereby you use credit and people didn't know you were using them.

THE COURT: I think that's what he says exactly.

MR. RIVERS: Except the people that were using them had no nexus, no connection at all with the people who the cards belonged to, or whereby you used the mail as an integral part of --

THE COURT: What is it that you are relying on in that connection?

MR. RIVERS: As I indicated to you, I don't have my brief.

THE COURT: No. No, you made a statement that there was no connection, no nexus.

MR. RIVERS: Foto Factory and the customers -- now, there was a connection here. But in all the other cases I have read, there isn't when there are credit cards involved.

THE COURT: I don't know about the other cases of credit cards. We decide this case on the facts.

Well, let me hear what Mr. Friedman has to say.

Where do you find intent, Mr. Friedman?

MR. FRIEDMAN: Your Honor, intent is found in the conduct and statements of the defendants in connection --

THE COURT: What conduct are you talking about?

MR. FRIEDMAN: I am talking about the mere fact that they knowingly billed 12,000 people for something that they didn't order. They got the money. And they sent out in the mail, in furtherance of the scheme, an ambiguous statement which had material --

THE COURT: A little louder.

MR. FRIEDMAN: An ambiguous statement that had material omissions as to what they were being charged the $9.95.

And, your Honor, under the elements of fraud, an omission is a misrepresentation. An omission is a deception. An omission can be a falsity. And certainly the consumers as well as the three banks were injured.

And those were all of the elements.

THE COURT: Who?

MR. FRIEDMAN: The consumer as well as the banks were injured.

THE COURT: I don't know about the banks. But, anyway, I think Mr. Rivers -- neither Mr. Rivers nor Mr. Pincus made the argument, which I thought existed, that all the people got paid back.

MR. FRIEDMAN: Your Honor, if you rob a bank and you give the money back, you still have committed a crime.

THE COURT: Didn't they all get paid?

MR. PINCUS: Yes.

MR. FRIEDMAN: If you commit a fraud --

THE COURT: Have they all been paid?

MR. FRIEDMAN: There's no evidence that they have all been paid.

MR. RIVERS: I didn't finish, but that would have been the next point.

THE COURT: I just jumped the gun on you.

MR. PINCUS: Yes.

MR. RIVERS: Yes. Whether or not there were damages involved --

THE COURT: There don't have to be.

MR. RIVERS: All theelements of fraud, I am

looking at.

THE COURT: There are a number of cases -- I had that in the Regiment Tablets case.

MR. PINCUS: Throughout this entire trial there have been some 12,000 mailings that have been alluded to. And out of the 12,000 he has 50 counts. And out of those 50 counts he's produced 7 or 8 persons. And those 7 or 8 persons, it seems to me, had an axe of their own to grind. The mailing was too slow.

THE COURT: He didn't hav to prove that any of them lost --

MR. FRIEDMAN: I would like to add --

MR. RIVERS: But he would have to prove intent. He has to prove intent to defraud.

THE COURT: That's what you say.

MR. RIVERS: Beyond a reasonable doubt.

THE COURT: That's what he says. He says the contrary.

MR. RIVERS: By what?

THE COURT: You are not the jury, I am not the jury, and he is not the jury. And neither are you.

MR. RIVERS: Every single one of his witnesses ate away from his foundation of intent.

THE COURT: That's your conclusion.

MR. RIVERS: Every one.

THE COURT: I didn't think that that is so at all. I mean you get up and make statements --

MR. RIVERS: Let's recall the witnesses' testimony.

THE COURT: Well, you recall it. I recall it very well.

MR. RIVERS: Based upon Mr. London's testimony, he said there was a complaint made to me over a period of time by Mr. Seminara that there had been errors. And he hired me as a result of those errors. Mr. London says there was computer involved in the case.

THE COURT: No. You are building up --

MR. RIVERS: And let's go to Mr. Hughes's testimony.

THE COURT: What about the computer error, Mr. Friedman?

MR. FRIEDMAN: Your Honor, the evidence is that no computer was used to prepare the $9.95 charges.

MR. RIVERS: What evidence? According to Mr. London, he couldn't say whether or not there were. There might have been -- it might have been used as part of the preparation here.

THE COURT: All right. Very well. You can't

MR. PINCUS: May I add one sentence?

THE COURT: And let me have your briefs by tomorrow.

MR. PINCUS: May I say this, your Honor, that --

THE COURT: Tomorrow is Tuesday. You know, I have to try the Finland -- the Finnish case on Wednesday. So let me have that brief as soon as you come in. I will read it during the lunch hour and I will give you a decision.

MR. PINCUS: May I just add this. It seems to me that every one of the prosecution witnesses had one thing in common. They were all a little confused as to the entire operation because they were all in different facets of the operation. And some said they never knew of a computer, another said there was a computer.

THE COURT: You're talking about the consumers themselves?

MR. PINCUS: No. The people that worked for Foto FActory. Everyone.

THE COURT: Were confused?

MR. PINCUS: Were confused. They didn't --

THE COURT: No. This last witness was confused?

MR. PINCUS: Your Honor --

THE COURT: Gentlemen, I am not in Wonderland

with Alice.

MR. PINCUS: Please hear me out. The one point I am bringing out is that despite the fact that someone knew that there was a mailing about a $9.95 -- I mean they had one thing in common. A credit had been issued and no one lost money.

THE COURT: That doesn't prove intent at all.

MR. PINCUS: They didn't get anything.

THE COURT: I don't understand your legalities or your theories of the law at all. Now, I don't understand that. Because they don't have to prove there is any loss. The Government never has to prove --

MR. PINCUS: That is very important with respect to intent.

MR. RIVERS: But they have to prove intent.

THE COURT: That's right. And the fact that there is no loss doesn't necessarily mean there hasn't been an intent.

MR. RIVERS: But if youwrite a letter saying that if you have been debited, get in touch with me and I will see that you have a credit. This is not a specific intent. It is not just any intent.

THE COURT: No. The intent is determined at the time they put the charges in. Not when later when someone --

MR. RIVERS: Your Honor, in all of the surrounding circumstances --

THE COURT: Gentlemen --

MR. RIVERS: They are not going to prove intent.

THE COURT: All right. Now, I think we ought to go ahead with your case.

Bring in the jury.

Gentlemen, the deputy courtroom clerk has brought to my attention that the forelady of the jury has stated to him that this is a 4-week-- that we have been trying this case for --

THE CLERK: The third week. It is the fourth week of their service.

THE COURT: And that they would be willing to cut down their lunch hour and to stay late and do anything possible to accelerate the determination of this case. Therefore, we shall do that. We will stay late and we will cut down the lunch hour to three-quarters of an hour or order sandwiches.

All right, call in the jury.

MR. RIVERS: We have one witness here.

THE COURT: All right. We are going to bring in the jury.

MR. RIVERS: If you are going to stay late, we don't have the witnesses.

THE COURT: Well, you can't do it suddenly. You can't be bound by any sudden notice at this time.

How many witnesses are you going to bring in, Mr. Rivers? When are you going tobring in the rest?

MR. PINCUS: Fourteen.

THE COURT: All right. You'd better -- we will start early and stay late.

MR. FRIEDMAN: Your Honor, the Government is going to move to quash the subpoena directed at the Assistant U.S. Attorney Cheryl Schwartz.

THE COURT: Why?

MR. FRIEDMAN: First, on the grounds being that the defendant has not complied with rules of the CFR that require that before an Assistant U. S. Attorney is to testify a request must be made to the Attorney-General.

THE COURT: This is most unusual. Most unusual. I am not going to -- this has been an exceptional case right from the beginning, Mr. Rivers.

MR. RIVERS: Didn't you say she made a record as a Hearing Officer in another capacity in this case, and that it therefore makes a difference?

THE COURT: It may make a difference.

MR. FRIEDMAN: That will be hearsay.

THE COURT: What?

MR. FRIEDMAN: That would be hearsay anyway.

THE COURT: What's hearsay?

MR. FRIEDMAN: The fact that she made the record.

THE COURT: You will have to comply with what the Attorney-General --

MR. FRIEDMAN: Yes.

THE COURT: Call him up. He will probably give his consent but I am not going to -- if what he says is true, I am not going to break the law or violate the regulations. But I am not too worried about the fact that he calls her if it is relevant.

MR. FRIEDMAN: We will ask for an offer of proof outside the presence of the jury, your Honor.

THE COURT: Well, now --

MR. FRIEDMAN: If there is some compliance with the provisions of the CFR --

THE COURT: I will want to see the proof.

MR. RIVERS: Did your Honor ask for an offer of proof for every witness?

THE COURT: No. But, you know what we are talking about when you have an Assistant U.S. Attorney. I think it's perfectly proper to ask for an offer of proof. We have certain rules and regulations and

certain requirements and amenities that are observed here.

(Continued next page.)

(The following occurred in the absence of the jury.)

MR. FRIEDMAN: Your Honor, I also take it that the defense attorneys will not call any witnesses who they expect to take the 5th Amendment in the presence of the jury.

THE COURT: Well, I don't know anything about that.

MR. RIVERS: I don't know about that.

May I have this marked as a Court's exhibit?

THE CLERK: Court's Exhibit 1?

MR. RIVERS: It is a record made by Schwartz.

THE COURT: It is not the Court's exhibit, I assure you.

MR. RIVERS: Well, may I have this marked for identification?

THE COURT: Bring in the jury.

THE CLERK: Document marked Defendant's Exhibit N for identification. It is a document dated November 14, 1973.

(Document referred to dated November 14, 1973, was received and marked Defendant's Exhibit N for identification.)

THE COURT: How about tomorrow morning? How early can we start tomorrow morning, Mr. Friedman?

MR. FRIEDMAN: The Government is prepared to to go at any time.

THE COURT: Well, we have to start early, 9:30.

MR. FRIEDMAN: 9:30, 9 o'clock.

(The jury thereupon returned to the courtroom at 3:35 o'clock p.m.)

THE COURT: I have the message about the jury wishing to accelerate this case and accordingly we will start -- accelerate the determination of the case. We will start tomorrow morning at 9:30 and we will try to have lunch in three-quarters of an hour or half an hour, whatever ispossible. If you have to go out a half hour it might be too short. If you want to bring your lunch that's another matter. But let's start tomorrow at 9:30. Youcan think about how you want your lunch or what time you want your lunch for tomorrow at 1 o'clock. We will stay late tomorrow. Unfortunately today there is only one witness yet available. So we can't stay too late because that witness's testimony will probably be exhausted within a half hour or within an hour.

Very well. Call the witness, Mr. Rivers.

MR. RIVERS: May I call Cona J. Gallo.

THE COURT: Who is that?

MR. RIVERS: Mr. Gallo.

THE COURT: I don't know who it is.

MR. RIVERS: Shall I go outside and get him?

THE COURT: Wait a minute, Mr. Rivers. The clerk will get him.

THE CLERK: Is he in the witness room?

MR. RIVERS: The witness room? I didn't know one existed. He has been standing outside of the courtroom.

THE COURT: We have had one here for over 10 years, Mr. Rivers.

MR. FRIEDMAN: Your Honor, can we have a clarification as to whether the witness is for both of the defendants or one of the defendants?

THE COURT: I think that can be worked out. Ask Mr. Pincus.

THE CLERK: Please raise your right hand.

(Witnesssworn by the Clerk.)

THE CLERK: Please take the stand and state your name for the record and please spell it.

C O N O J. G A L L O, called as a witness, having been first duly sworn by the Clerk of the Court, took the stand and testified as foldows:

THE WITNESS: Cono, C-o-n-o J. G-a-l-l-o.

THE COURT: Mr. Pincus, is this witness in your

behalf too?

MR. PINCUS: Yes, your Honor.

THE COURT: Very well, proceed.

DIRECT EXAMINATION

BY MR. RIVERS:

Q Mr. Gallo, what is your profession?

A Certified Public Accountant.

Q Were you the accountant for Foto Factory Limited?

A No, sir.

Q Did there come a time when you were requested to do an analytical statement on the finances of Foto Factory Limited for a particular period?

A Yes, sir.

Q What period was that?

A September 15 to October 31.

Q What year?

A 1973, I believe.

Q Now, did you have any connection at all with Foto Factory Limited before that time?

A No, sir.

Q Who made that request of you?

A Mr. Seminara through an attorney.

Q What did that analytical statement consist of?

A It basically was an analysis of the various bank accounts and tracing of funds from those bank accounts to the regular bank account of the corporation, and then disbursements from that regular account.

Q Did you know what the business of Foto Factory Limited was?

A Not really, sir, just up until the time we had gotten the request.

Q Who supplied you with the raw materials for this statement, and what was it, or what did it consist of?

A Mr. Seminara supplied the information. It was cash receipts and disbursements of the corporation, bank statements, cancelled checks, some paid bills, and I think that is about it -- oh, and payroll records.

Q Now, did you make any finding with regard to the payment to Mr. Seminara or Mr. Lent during this period of time of salaries or drawings, or anything like that?

A There was. But it was consistent with what had been in the past.

Q Was there a period of time during this period that no salaries were paid?

A Yes, sir. I believe there was a week or two that they hadn't taken salaries.

Q Did you make an inquiry as to whether or not any monies were siphoned off for any purpose other than

business purposes?

A We didn't specifically make an inquiry, but we could find none.

Q You could find none?

A We could find none.

Q Did you determine whether or not any monies were used during this period of time for the payment of advertisements?

A Yes, I believe there was.

Q And what was the total figure on that?

A I have a copy of the report.

Q Would you refresh your recollection?

(Witness examines document.)

A I have got them marked off, Mr. Rivers, but I would have to add them up.

Q All right.

(Witness examines document.)

A I have $26,370.30.

Q Can you tell us specifically what dates they were paid?

A Yes.

Q And to whom they were paid?

A On September 17, 1973, $1,000 to Forbes Advertising Company. September 21, 1973, John Johns Group,

$500. September 21, 1973, $1,500 to Forbes Advertising. September 27, 1973, Forbes Advertising Company, $3,500. September 27, 1973, Forbes Advertising Company, $1,500. September 24, Forbes Advertising Company, $8,000. September 25, John Johns Group, $592.20. September 27, 1973, New York Times, $1,000. October 1, 1973, Forbes Advertising Company, $1,000. October 2, John Johns Group, $500. October 8, Ziff Davis Publishers, $1,000. October 15, 1973, was for Ziff Davis Publishing, $1,000. October 4, 1973, New YOrk Times, $1,000. October 4, Forbes Advertising Company, $1,500. October 4, Forbes Advertising Company, $1,500. October 9, John Johns Group, $497.81. October 11, New York Times, $1,000. October 11, Forbes Advertising, $1,500. October 11, Forbes Advertising Company, $750. October 11, Forbes Advertising Company, $500. October 15, John Johns Group, $2080.39. October 9, Forbes Advertising Company, $1,000. October 15, Forbes Advertising Company, $1,000.

Q Now, that is a record that is based on checks, is that right?

A Well, it was checks and it wasnotes. The notes cleared the bank so --

Q Now, with regard to the Bank of North America, there was testimony by a bookkeeper here in this Court that the Bank of North America was not used as a depository until some time in October.

MR. FRIEDMAN: Objection, your Honor, I believe the testimony was that the bank was not used for the $9.95 deposits until October 17 --

Q Can you tell me with regard to deposits in the Bank of North America whether there were any prior to the month of October?

A Yes, there were --

Q Can you tell us what dates they were?

A September 24, 1973, $4,800. September 24 --

THE COURT: Now, just a minute. Are you talking about the general checking account or are you talking about a $9.95 account?

Q Do you know anything about a $9.95 account?

THE COURT: There's not going to be any confusion here.

MR. RIVERS: Your Honor, there is no such thing as a $9.95 --

THE COURT: Now, wait a minute, you are not testifying. I heard the testimony and so did the jury. And this man testified, stating that they did not have any account in which they put $9.95 card slips in, and that didn't happen until October 15. Now I am not talking about this young lady. I am talking about the officer of the National Bank of

North America.

MR. RIVERS: Yes.

THE COURT: That's right.

MR. RIVERS: They are not $9.95 accounts. They are credit card accounts generally.

THE COURT: Let's get it straight.

MR. RIVERS: I am going to find out from the witness exactly.

THE COURT: Yes. I want the jury to know what kind of deposit he is talking about.

Q Is this a checking account you are talking about?

THE COURT: Of course it's a checking account.

A They have a number on the account.

Q What does it mean?

A Well, it specifies on the account. I don't know whether that's going to help you or not.

THE COURT: Is it the National Bank of North America?

Q Is it an account that was used generally for business or what do you know at all?

A I know there were deposits and I know that there were some withdrawals. But the answer to your question, if that constitutes, you know, an operating account, yes, --

Q Mr. Gallo, name all of the accounts that the office had.

THE COURT: The National Bank of North America?

MR. RIVERS: All of the accounts.

THE COURT: Well, in the National Bank of North America or in every bank?

MR. RIVERS: Every bank.

Q You can start with the National Bank of North America.

A I have six accounts. I have the Franklin National Bank, Special Tax Account. I have the Chase Manhattan Bank. I have the National Bank of North America.

Q How many accounts in the National Bank?

A I only have the one, sir.

Q One account.

A National Bank of North America.

Q Now, with regard to the National Bank -- have you finished giving us all the banks?

A First National City Bank and Bank of Delaware. Then there was what I consider the regular account for all disbursements, basically disbursements of the business.

Q But the National Bank of North America had one account, is that correct?

A Yes, sir.

Q And with regard to that one account in the National Bank of North America, can you tell us when they started using it?

A Well, I can onlylimit myself to the period of time --

Q The period of time --

A (Continuing) -- the deposit that we have is September 24, 1973 --

Q Any other deposits since September?

A September 24, 1973, there was no deposit, and on September 25, there was a deposit. And that was in terms of --

Q What were the total amounts of deposits?

A $14, 150.

Q Does your statement reflect any deposits in the National Bank of North America in October?

A No, sir.

Q You have nothing to do with Foto Factory, is that correct? You were hired for the job? You are a CPA?

THE COURT: Of course; of course. Yes, of course.

Q Now with regard to debits, that is chargebacks or debits from various banks, can you tell us how many there were from the First National City?

MR. FRIEDMAN: I object to that. I think the witness has to testify first as to the documents.

THE COURT: Well, you dropped your voice and you are looking down. I didn't understand you.

MR. FRIEDMAN: I object on the ground that a proper foundation has not been laid. Mr. Gallo is not here to testify to any chargeback documents.

MR. RIVERS: I will withdraw the question.

Q Were there any chargebacks or debits against the bank account at First National City during this period?

A No, sir, I don't have any on that First National City Bank during that period.

Q How about Chase Manhattan?

(Whereupon, witness examines document.)

A Yes, sir, there were.

Q How much were they and what denominations and what dates?

MR. FRIEDMAN: Your HOnor, I object on the grounds that the witness is not testifying as to what documents he looked at and whether these documents are available in Court today. He has given us figures.

MR. RIVERS: He has already indicatedhe used those documents. He is a CPA. He is a Certified Public Accountant and he is under oath.

THE COURT: Now, Mr. Rivers, we are not going to do that. Every witness has been under oath in their testimony. We know that this man is a Certified Public Accountant. We know that he is not connected with Foto Factory. So there is no point in repeating that. What we are interested in here is to get the facts and what this man knows from looking at the accounts. I heard him say he went over the cancelled checks, the payroll accounts and also cash receipts and the disbursements, and accounts payable, et cetera, et cetera.

THE WITNESS: No, sir, not accounts payable.

THE COURT: I mean the payable accounts and not accounts payable.

THE WITNESS: And the individual payroll.

THE COURT: Yes. Your question is here what chargebacks and debits were you able to determine from the Chase Manhattan Bank account? Isn't that the question?

THE WITNESS: Yes, sir.

THE COURT: Did you look at the Chase Manhattan Bank account?

THE WITNESS: Bank statement.

THE COURT: BAnk statement.

THE WITNESS: Yes, sir.

THE COURT: All right. You looked at the bank statement. VEry well, what does it show?

THE WITNESS: You are not concerned about the bank service charge? Do you want that as part of the charge?

Q Yes.

A All right, the service charge on October 3, was $2.30. And then on October 1, 1973, there was $44.68. On October 1, there was $236.01. On October 11, $283.24, $191.10, $142.54, $76.01, $28.51, $9.62. October 18, $5.00. October 18, $737.95 --

MR. FRIEDMAN: Excuse me, Mr. Gallo. I object. I don't know what this has to do with the case. I object to its relevancy.

THE COURT: I do not see that it is relevant at all. I sustain the objection.

MR. RIVERS: Exception.

Q How about the debit memos?

A These are the debit memos.

Q The debit memos --

A I am sorry. This is the debit memos that I am reading off.

Q Yes. You have the chargebacks?

A Well, I have no way of knowing --

Q But you know that the bank debited Foto Factory, is that so?

A Yes, sir.

MR. RIVERS: Is it the Court's ruling that it has nothing to do with the case?

THE COURT: No. Fromthe present testimony, from what he has given, all he is doing is reading the bank statement without any explanation whatsoever. Under the circumstances unless you bring out some other evidence my ruling is just as I said it was. It has proven irrelevant as of now.

Q Mr. Gallo, during the course of this case there was testimony that the bank debited FotoFactory for monies they were charging to customers in that Foto FActory did not pay the debits or cut them off. I want to know for this period of time --

THE COURT: Wait a minute.

MR. RIVERS: I think the bookkeeper testified --

THE COURT: I don't remember all this type of testimony.

MR. RIVERS: The bookkeeper testified that there were times when this thing -- when she was ordered not to pay them.

THE COURT: Not to pay what?

MR. RIVERS: The debits.

MR. FRIEDMAN: Ordered not to deposit credit vouchers, your Honor.

THE COURT: No, no, no.

MR. RIVERS: Where the account was frozen.

THE COURT: And she was ordered not to put any more deposits in.

MR. RIVERS: But that the account was frozen and it didn't have enough to cover the debits. That was the testimony by this witness and by several bank witnesses.

THE COURT: All right, so what?

MR. RIVERS: I'm trying to indicate exactly what the debits were for the period of time involved.

THE COURT: It is immaterial or unless you can connect it with this case, to wit, the debits with respect to the $9.95.

MR. RIVERS: They don't separate them, your Honor. BAnks do not separate the debits from the $9.95's --

THE COURT: Yes. I think in this particular case, as I recall, there was separate bank accounts.

MR. RIVERS: I am talking about one bank

account now. I am talking about the Chase Manhattan Bank.

MR. FRIEDMAN: I would move to strike Mr. Gallo's testimony with respect to the debits. First Mr. Rivers asked him whether there were chargebacks. Mr. Gallo did. Then Mr. Rivers referred to debits. And then Mr. Gallo indicated the chargebacks --

MR. RIVERS: He didn't finish reading it.

THE COURT: No, I'm not going to have this. I think it is confusing --

Q Can you tell me, Mr. Gallo, what the total amount of debits were during this period without giving us the individual debits by Chase Manhattan?

A $10,403.00.

THE COURT: All right. Now, this is during what period, Mr. Gallo? September to October?

THE WITNESS: Yes, sir.

THE COURT: They were debits. Now, of course --

THE WITNESS: May I add one thing, sir?

THE COURT: Yes.

THE WITNESS: Within that figure, there is $6,419 -- $6,419.70, which closed out the Chase Manhattan account. That was a charge --

THE COURT: That is a debit which closed out

the accountwhich I guess is indicative that the bank used it for its own debit, so they closed it out. Now that leaves you how much?

THE WITNESS: $3,983.

THE COURT: $3,983.

(Continued next page.)

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THE COURT: Can you say they are charged back from Consumer Credits or Debits? Are they charged back to consumers as far as you know, can you tell anything about it?

THE WITNESS: I do not know. I know they are Debit Memos. I cannot say anything further than that.

THE COURT: That is the whole point. The jury is not inteeested in large sums of debits unless you can show those debits are charged back, or credit charged back to the customers, and charged back to the defendants, arising out of the $9.95 transactions. You have to have some connection, some nexus.

MR. RIVERS: I cannot isolate them to the $9.95's.

THE COURT: What is the relevance. What do you think as to how anyone can reach a conclusion as to what it means?

MR. RIVERS: They can reach a conclusion the debits were paid by the company.

THE COURT: So what?

MR. RIVERS: They were not cut off from paying the debits, they paid them.

THE COURT: What debits are they? They could arise out of anything.

MR. RIVERS: The testimony of the Government case

was to the effect they were not paid by the company.

THE COURT: I do not know about that. I know they were charged back. The customers were credited, as I understand the testimony, and the defendants were debited, right?

MR. RIVERS: Yes.

THE COURT: How much, and whether it covered all has not been made clear to this Court. What I am saying to you is that this type of testimony does not add anything to it except you know there were debits to the company. What they arose out of we still do not know.

MR. RIVERS: This relates to the reduction of income to the company.

THE COURT: Of course, all debits result in a reduction of income to the company.

MR. RIVERS: Right.

THE COURT: The relevance question is, what relation does it have to the $9.95's?

MR. RIVERS: Your Honor, I am not going to isolate these two $9.95's.

THE COURT: If you are not, then the question is, How relevant is it?

MR. RIVERS: I do not have the facilities of the Government.

MR. FRIEDMAN: He has corporate documents.

MR. RIVERS: I do not have any corporate documents. The corporate documents you know are tied up in other units of Government. You have more documents than I do.

THE COURT: We are not going to have an argument. I will permit the testimony that there is a debit of $3,983 that was charged back to the Foto Factory Limited. The rest is a close out.

MR. FRIEDMAN: I most respectfully object to the Court's use of the word "charge-back."

THE COURT: I don't know, it is a debit. I do not think there is any testimony from this witness it is a charge-back, but it is a debit.

BY MR. RIVERS:

Q Was there a regular bank account maintained in Delaware?

A In Delaware, sir?

Q Yes.

A There was a bank account in Delaware.

Q What was it maintained, was there activity in the bank account?

THE COURT: What bank was that, if you know?

THE WITNESS: Bank of Delaware, sir.

THE COURT: Bank of Delaware in Wilmington?

THE WITNESS: I do not have the place.

THE COURT: It does not make any difference.

THE WITNESS: In answer to your question, Mr. Rivers, there was one deposit, one withdrawal during the period that we had covered.

Q The amount was deposited and was withdrawn?

A The deposit was made on October 9th and that was traced from the Franklin National Bank. And there was one check that went out on October 25 that was deposited back into the Franklin National Bank, so it was really --

Q Going from Franklin and deposited back into Franklin?

A That is right.

Q And it closed out the account?

A That is right.

Q Which was the business account for Foto Factory Limited?

A Are we talking about what bank now, what bank?

Q Which bank account of all these bank accounts was the operating bank account?

THE COURT: Of all the bank accounts, you are not limiting it to the National Bank of North America?

THE WITNESS: No. In answer to your question,

it was Franklin National Bank.

Q Was that the bank where they paid their bills, is that right?

A Yes, sir.

Q Did you have an opportunity to look at the account prior to this period, that is, the books and records and checks for a period prior to September 15, 1973?

A No, with one exception. We did want to trace the payroll to see that there was a consistency in the payroll. To that extent, we did go back on it.

Q In tracing that, did you determine whether or not the payroll had been supplied, that is, the money for the payroll had been supplied from other banks? Do you understand my question? I will withdraw that.

What checks paid payroll, from what bank?

A It came from Franklin National.

Q Where did the moni comes from to pay payroll?

A Basically they were flowing in from these five other accounts.

Q The other accounts?

A Yes.

Q From what was deposited in the other accounts, all of them would be gathered up and deposited in Franklin National? And that was for the life of the business?

A I cannot say for the life.

Q For the time you did this?

A For the time I covered the audit, that is the way it worked.

Q Was it for the period October 1 -- September 15 to October 30, is that right, it was not just for that period it happened?

A We did not go back that far in terms of tracing from the various five other accounts into the Franklin National.

Q Do you understand my question? It was not just for September 15 to October 31st that the money flowed into Franklin and was paid out for payroll, it was for the entire period this happened?

A Yes.

MR. FRIEDMAN: Your Honor, I have not objected to Mr. Rivers' leading questions, but I would just ask--

THE COURT: No, he can lead him. He let you lead.

Q For that period of time, how much money was credited from the Chase Manhattan Bank?

A Chase Manhattan Bank had $79.525.62 in deposits or credits.

Q What was that, credits, deposits --

THE COURT: Just a moment. Did I understand

your testimony, Gallo, that you had $79,000 from Chase Manhattan Bank that flowed out of that account?

THE WITNESS: No, sir, I understood the question was, How much was deposited in that account, Chase Manhattan.

Q Deposited from Chase Manhattan into Franklin.

THE COURT: That is right, that is what I thought you said.

THE WITNESS: $70,050.

Q From the First National Bank, how much?

THE COURT: And that is over what period?

THE WITNESS: That is from October 14 to October 18.

Q And from the First National City, how much was deposited? Do you understand me, Mr. Gallo? How much was deposited from the First National City into Franklin National?

A I understand, $55,000 even.

Q And from National Bank of North America?

A $8500, I am sorry, $12,500.

Q With regard to the same banks, how much was debited, do you understand what I mean?

A Yes, I understand.

Q How much was debited?

THE COURT: I do not understand that.

THE WITNESS: When you say how much was debited--

Q How much was debited against the company with regard to these same bank accounts? Do you understand my question?

MR. FRIEDMAN: Your Honor, I must respectfully object.

THE COURT: I do not understand that question either. We were talking about the transfer from these various banks to Franklin National.

Q I want the other side of the picture.

THE COURT: You cannot transfer the sum unless you transfer the net sum after the debit, is that right?

THE WITNESS: They are coming out of one account and going into another account.

THE COURT: You have to take the net sum in that account which has been transferred from the National City Bank?

THE WITNESS: I do not know what you mean?

THE COURT: The balance in the account, is that right?

THE WITNESS: Right.

THE COURT: The balance would be after all changes are made, is that right? You cannot take what is in the account, can you? This is just cash, is that what

you are talking about?

THE WITNESS: In answer to the question, I am only giving the amounts that went into the account, went into the First National, and there is nothing netted out.

THE COURT: Are you talking about cash then, it is only cash?

THE WITNESS: No, it is checks, that is, if you are distinguishing between cash and checks. In other words, there is a check drawn against that account in each of the accounts I mentioned, and deposited in Franklin National.

THE COURT: Did that exhaust that account?

THE WITNESS: No, because there had been deposits in some of these accounts.

THE COURT: You take the $79,000, that is where this type of testimony is confusing. You take $79,000 out from Chase Manhattan to Franklin National, $79,000, is that right?

THE WITNESS: Yes, sir.

THE COURT: Did that leave that checking account with nothing in it?

THE WITNESS: No. Because there had been deposits made and there had been other checks issued from that

account by taking those checks.

THE COURT: This was --

THE WITNESS: Just a series of checks.

THE COURT: A series of checks which had no necessary relation to the net balance, is that right?

THE WITNESS: That is right.

THE COURT: They just drew a check?

THE WITNESS: Yes, sir.

THE COURT: All right, he drew checks and deposited them in the Franklin National Bank.

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BY MR. RIVERS:

Q With regard to these accounts, were they debited,in other words, the money deposited in the account some of it was debited against the company? I did not ask you for the total amount deposited in the account. I am asking you for the amount of money for that same period of time in each account that was debited against the company by the bank?

A When you say debited, you are talking about the debit memos?

Q Yes.

THE COURT: Well, didn't we already take that up with the Chase Manhattan and reach the conclusion that there was three thousand nine hundred eighty-three debited?

THE WITNESS: Yes, sir.

THE COURT: What are you asking, Mr. Rivers, about it?

MR. RIVERS: The First National City Bank and the Bank of North America.

THE COURT: All right.

THE WITNESS: The First National City had no debit memorandums and the Bank of North America had no debit memos.

Q What is that?

THE COURT: He has no debit memos.

Q Mr. Gallo, from the period -- what was this period you are referring to?

A September to October 31st.

Q September 15 to October 31st.

MR. RIVERS: May I have just a moment, your Honor?

(Pause.)

MR. RIVERS: I have no further questions.

MR. PINCUS: Your Honor, there are a few questions I would like to ask.

MR. FRIEDMAN: Are they splitting up the examination?

MR. PINCUS: I have only a couple of questions, your Honor.

THE COURT: I am going to listen very carefully and see that they are just a few questions.

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DIRECT EXAMINATION

BY MR. PINCUS (continued):

Q Mr. Gallo, would your records show expenditures or checks that were paid by Foto Factory for merchandise they required between September 28, 1973 and October 18, 1973?

MR. FRIEDMAN: Objection. I think the proper question is what documents did he look at.

Q Did you have any documents with respect to expenditures between those dates?

A Canceled checks.

Q Canceled checks.

MR. FRIEDMAN: What dates?

Q Between September 26, 1973 and October 18, 1973.

A You are referring to supplies, sir?

Q Yes. Could you tell me, was there a check on September 26 to Kodak?

A Yes.

Q What was the amount of that check?

A Twenty-two hundred fifty-eight dollars, forty-eight cents.

Q Does it tell you what that was for?

A They had in the books film and chemicals.

Q Right. On September 26, was there another

check to Maizel for film?

A Yes, twenty-eight hundred dollars.

Q Was there another one on October 4th to Kodak?

A I do not have any October 4.

Q How about October 5 to Kodak?

THE COURT: What is your next one as to Kodak?

Q Would the check number help you?

A Yes, it would.

Q Check number 3045? I believe you gave us, that was Maizel, twenty-eight hundred dollars.

A 3045 is Maizel, right.

Q Do you have a check number 3236, October 4?

A Yes, sir, I am sorry.

Q That is for Kodak?

A Sixty-six hundred nine dollars, eighty-six cents.

Q How about check 3242, October 5, to Kodak?

A 3242 -- I have Maizel.

Q All right, what is the amount?

A Four thousand dollars.

Q And 3107, October 5?

A I do not seem to find that one.

Q How about 3264 or 3265?

A 3264 and 3265 is Eastman Kodak, October 9.

Q How much?

A Five hundred eighty-four dollars, sixty-two cents and four thousand thirty-one dollars, fifty cents.

Q And how about 3276, October 10?

A Five thousand dollars.

Q Does it say what it is for?

A Paper.

Q And 3105, October 10?

A 3M, eighteen hundred thirty-two dollars, fifty-two cents.

Q What is that for?

A Paper.

Q And 3181, October 10?

A I have 3182, Initio America, one thousand dollars for film.

Q For film?

A Yes, film.

Q How about 3317, October 15th?

A Eastman Kodak, forty-nine hundred five dollars, fifty-four cents.

Q For film?

A For film.

Q 3164, October 15th?

MR. FRIEDMAN: Excuse me, I do not know how

much longer this is going to go on. Again I renew my objection on the ground of relevance. I do not know what this has to do with the unauthorized 995 charges.

THE COURT: This was to be two or three questions.

MR. PINCUS: Well, it is really the same question. The reason I feel this is entirely relevant --

THE COURT: Never mind. I suppose, Mr. Friedman, to answer your objection, as far as I can ascertain it is to show that the company was still processing film.

MR. PINCUS: That is right.

THE COURT: That is about all there is to it during this period.

MR. PINCUS: I have only one more entry after this.

MR. FRIEDMAN: I believe it has been testified there was some processing by Mrs. Nieman.

MR. PINCUS: She first said she thought they were doing very little processing.

THE COURT: I think she said as to new films nothing new was coming in, they were processing old

film.

MR. PINCUS: I want to show new film, fresh film was coming in.

MR. FRIEDMAN: There is no testimony he knows the money for Kodak went for rolls of film or for chemicals to process the old film.

MR. PINCUS: He testified what each check was for, for film or paper.

THE COURT: He just said Kodak, five thousand dollars and for paper to 3M.

BY MR. PINCUS:

Q In all, could you tell us if it was roughly in the neighborhood of forty thousand dollars that was spent between September 26th and October 18 for film and paper?

THE COURT: Somebody else testified to something about forty thousand dollars for paper.

MR. PINCUS: That was a previous witness, your Honor.

THE COURT: For paper.

MR. PINCUS: She testified it was only for paper, your Honor.

THE COURT: You see, what bothers me, Mr. Pincus, these are general statements not tied

up with whether the film was just coming in or whether it was payment for film already used a month ago. It is floating around.

MR. FRIEDMAN: Again, whatever it is used for, I do not know what that has to do with the indictment, your Honor.

THE COURT: With what?

MR. FRIEDMAN: With the indictment, your Honor, with this case.

THE COURT: What it has to do with, as I see it, what Mr. Pincus wants to show is that Miss Nieman does not know what she is talking about.

MR. PINCUS: That is correct, your Honor.

THE COURT: That is up to the jury.

MR. PINCUS: And some other witnesses.

THE COURT: The jury are here and they will be able to say one way or the other whether they believe these people, so we will let it go at that.

THE WITNESS: It is approximately that.

THE COURT: For both paper and film?

THE WITNESS: Yes.

BY MR. PINCUS:

Q These checks were not a partial payment, these were complete payments?

A I do not know sir, I have no way of knowing.

THE COURT: I think you have passed the number three mark.

MR. PINCUS: Just one last question, your Honor.

Q Were any checks during the period of time that you audited made out for cash or to either of these defendants for expenses?

THE COURT: That question has already been answered, but we will let it be asked again.

Q Were there any checks during the period of time of your audit that went to either of the two individual defendants or for cash?

A Petty cash, if you are categorizing it that way.

Q No, larger sums.

A Just one check was made out to cash on October 26, eighteen hundred dollars.

Q We know what that was for. Anything else?

A No, sir.

THE COURT: Do you have any redirect?

MR. FRIEDMAN: Your Honor, I have cross-examination.

THE COURT: Yes, cross-examination.

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MR. FRIEDMAN: May I have this marked for identification?

THE CLERK: Government Exhibit 72 marked for identification, document dated 10/31/72, marked Government Exhibit 72 for identification.

(So marked.)

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CROSS-EXAMINATION

BY MR. FRIEDMAN:

Q Mr. Gallo, what was the $1,800 check for Mr. Pincus asked you about?

A It was a check made out on the 26th of October. I have a foot-note on it, $1,800 in cash. The net payroll for the week ending October 26th amounted to $2,158.03, and a notation was made in the checkbook on 10/26, the payroll check $2,158.03, and the $1,800 check dated October 26th was marked payroll on the stub portion of the check and according to this Mr. Seminara used it for payroll.

Q What do you mean according to Mr. Seminara?

A We asked.

Q You asked Mr. Seminara and he told you?

A Yes.

Q Did you check the endorsement on that check?

A Yes, it was cashed.

Q Who cashed it?

A I believe he had endorsed it.

Q Mr. Seminara endorsed it?

A Yes.

Q When you testified Mr. Gallo, that it was for payroll, did you base the statement that it was for payroll on what Mr. Seminara told you, is that right?

A Well, one other point here. There is no evidence from the records provided that any of the checks #988 to 1019 ever cleared the bank. In other words -- may I elaborate on it?

Q Yes, please do. When ever I ask you a question and I cut you off I would like you to elaborate, I am sorry.

A Apparently the system the sorporation used was that they would issue a series of checks for the payroll and then to enter the one amount in the check disbursement journal.

Q Let us get back to the $1,800 check you have testified was used for payroll. I would like to pinpoint what you base the statement that the $1,800 check was used for payroll.

A These checks 988 to 1019 were payroll checks, that is how they had been indicated in the books.

Q WAs the $1,800 check that was endorsed by Mr. Seminara payable to cash?

A Yes.

Q So in large part you are basing it on the fact Mr. Seminara told you that check went to payroll?

A No, these checks I mentioned never cleared the bank so that it seemed logical that some of that money could have been used for payroll checks.

Q I am not asking you to guess now on what the money was used for. I am asking you to tell us what you base that statement on?

A That was the basis of the statement.

THE COURT: Did the $1,800 check clear the bank?

THE WITNESS: Yes. But those other payroll check did not clear.

THE COURT: But the $1,800 check did clear?

THE WITNESS: Yes.

Q Mr. Seminara told you this $1,800 check was for payroll, is that right?

A Yes.

MR. RIVERS: I think his own witness testified the $1,800 went for payroll.

THE COURT: I do not recall that testimony at all.

MR. FRIEDMAN: The jury can decide whether they recall the testimony or not.

Q Mr. Gallo, I would like to ask you if you know who engaged you to do this audit?

A Mr. Seminara.

Q Do you know if Mr. Seminara had any other accountan prepare an audit before you?

A No, sir.

Q Where were the documents you looked at?

A Brought to our office.

Q Who brought to your office?

A Mr. Seminara.

Q When did he do that?

A I would guess that was approximately 10 days before this report was made out.

Q What is the date?

A I would guess somewhere around March 10 or so.

Q March 10 what year?

A 1974.

Q March 10, 1974? Now, at that time did Mr. Seminara tell you about all the bank accounts that Foto Factory Limited had in 1973?

A Yes, he brought the statements in of whatever had.

Q What banks did he bring in statements for?

A The five. Do youwant me to repeat them, the five I mentioned, Franklin National Bank, Special Tax Account, Chase Manhattan Bank, the National Bank of North America, the First National City Bank, the Bank of Delaware and the regular Franklin National Bank that most of the activity was in.

Q Did Mr. Seminara tell you they had -- that Foto Factory Limited had bank accounts in California?

A No.

Q Did he tell you they ever had bank accounts in California, Foto Factory Limited?

A No, sir.

Q Did he ever tell you they had bank accounts in California?

A No, sir.

Q By the way, did Mr. Sciarra have you examine his personal checking or bank accounts?

A No, sir.

Q How about Mr. Lent?

A No, sir.

Q Do you know if they had any personal checking accounts or savings accounts?

A No, sir.

Q So that was not part of your inquiry?

A No, sir.

Q If they in fact existed, is that right?

A That is right.

Q Who paid you for your services, sir?

A Mr. Sciarra.

Q Have you done any work for a company called Uni-Foto?

A No, sir.

Q How about CBS Laboratories?

A No, sir.

Q I would like to ask Mr. Gallo, you are a Certified Public Accountant, is that right?

A Yes.

Q How long have you been a Certified Public Accountant?

A 1962.

Q Would you please tell the ladies and gentlemen of the jury generally the documents that you did look at, that were furnished to you by Mr. Seminara, what type of documents?

A Well, they were the corporation's cash receipts and cash disbursements. Cash receipts is basically what is coming in and cash disbursements is basically what is going out. There were the bank statements with the cancelled checks. There were individual payroll sheets, that is each individual employee has a sheet of their own. There were, as I recall, a group of files with paid bills.

Q Any further bills or invoices?

A Invoices.

MR. RIVERS: I would like to apologize but I would ask your Honor if I might come to the sidebar?

THE COURT: All right.

(The following took place at the sidebar.)

MR. RIVERS: Your Honor, Mr. Friedman is doing something that he knows is wrong.

THE COURT: What is that?

MR. RIVERS: The grand jury minutes bear out the fact that there was only check paid to cash. And that check paid to cash was cashed for $1,800 for a payroll. She said that in the grand jury. And he knows that this exists. Yet he wants to leave the jury with the impression that somebody get the $1,800. She said it again throughout and he knows this to be a fact.

MR. FRIEDMAN: Your Honor, that is not -- again they are misstating the record.

MR. RIVERS: I am misstating? Here is the record right here.

THE COURT: I didn't hear your statement.

MR. FRIEDMAN: I am indicating -- I would like to put on the record that the defendants again are misstating the record.

THE COURT: Who's misstating?

MR. FRIEDMAN: These two gentlemen. I am attempting to find out about the $1,800 check. And this witness -- I was probing his information with

respect to the --

THE COURT: What you are saying is they are giving you a false motive? Is that it?

MR. FRIEDMAN: Absolutely.

MR. RIVERS: He's saying this man took money when --

THE COURT: No. He wants to know what it is. What he really is asking is did they have any money in the savings account or personal account?

MR. RIVERS: I'm not talking about that. I am talking about the question about the $1,800 cash.

THE COURT: I think he has a right to ask it.

MR. RIVERS: May I inquire of the U.S. Attorney whether Miss Nieman is still in the building?

MR. FRIEDMAN: Miss Nieman is avilable for subpoena as well as everybody else.

THE COURT: Come on, let's not waste any time.

(End of sidebar.)

Q I believe I asked you when you referred to the bills if they werein fact invoiced?

A Invoiced, yes.

Q I see. Did you do a reconciliation of the banks' statements?

A No, sir. We traced.

Q Will you please tell the ladies and gentlemen of the jury what a bank reconciliation is in the practice of accounting?

A A bank reconciliation basically is a reconciliation between the books of the account and the bank. It reconciles their balance with the corporate book balance, taking into account outstanding checks or deposits.

Q None was done in this case?

A No. The reason it wasn't done is because of the nature of the -- this audit was not to determine the financial condition as of agiven period, but basically to trace the deposits from certain accounts into other accounts, and then to trace the disbursements from those accounts.

Q I see.

A So it had no value really.

Q Well, do you know the financial condition of the Foto Factory Limited on September 15, 1973, based on the work that you did?

A BAsed on the work that we did, I knew they were in trouble.

Q Financial trouble?

A Yes.

Q They had a lot of bills?

A Well, from the way the bank accounts were --

you know, the -- not the chargeback, but the debit memos were flowing in and out. I knew they had problems.

Q Did you add up the invoices or bills up to September 15, 1973, that hadn't been paid in order to determine how much they were in debt?

A I didn't have that. The invoices that I had were paid invoices.

Q How about the journals or ledgers? Were those made available?

A Yes, they were ledgers.

Q I see. And are you able to determine if you were given cancelled checks, copies of each and every cancelled check written on all of those corporate accounts from September 15, 1973, up to November of 1973 --

A To November of '73?

Q Yes.

A No. Because in some of them we didn't have the bank statements.

Q Let me ask you this question. Your work covered what period of time?

A It covered September 15 to October 31.

Q September 15 to October 31, 1973?

A Yes, sir.

Q Did you examine each and every cancelled check

that was written during that period of time?

A Yes.

Q How do you know that you examined each and every check during that period of time if you didn't do the bank reconciliation? If you can explain that.

A When the bank sends the statement, they send the cancelled checks along with it. And it was those cancelled checks that we had looked at and examined.

Q Well, how do you know that all of the cancelled checks you looked at were the only cancelled checks written during that period of time?

A We had the checkbook.

Q Whose checkbook?

A The Corporate checkbook that Mr. Seminara had given -- the check stubs. Let's put it that way.

Q Did you compare those cancelled checks with the bank statements to determine if each check that appeared on the bank statements, that you had the cancelled checks?

A Yes. Yes.

Q Did you do that?

A Yes.

Q Did you find any checks missing at all?

A Just some payroll checks.

Q Mr. GAllo, did you find any checks missing at

all?

A Yes.

Q How many did they amount to?

A I don't have the exact amount.

Q Can you give us an estimation, please?

A I don't have it in my report. I would have to go back to my worksheet. I simply don't have it.

Q Well, would you want to approximate? Or don't you recall?

A I really don't recall. I do recall the payroll checks were under $150. Between $150 and $200.

Q How about the other checks?

A I really don't recall the other checks.

Q Were you able to determine the amount of money of the other checks that were missing?

A I have to go back on my worksheet. I simply don't know.

Q Now, are you familiar with a practice whereby a corporation will siphon corporate funds off for personal uses? Are you generally familiar with that being done from time to time?

A Yes.

Q Now, with respect to your audit, what steps did you take? What investigation and what audit did you

conduct to determine if anyone had siphoned off corporate funds?

MR. RIVERS: Your Honor, first we have to establish whether or not he believed that to be so or whether it was not so.

THE COURT: I think that as an examiner he would make such an examination to determine that, wouldn't you?

MR. RIVERS: That's my next question. Did he make such a determination.

Q Did you make such a determination?

A You couldnot.

THE COURT: You could not?

THE WITNESS: You could not.

THE COURT: Why?

THE WITNESS: You could make it from the point of view of any monies being siphoned off, going out of the corporation. But you have no way of -- and we had no way of knowing whether all the deposits were put in.

Q I see.

A The audit that we had made was basically taking the deposits and transferring them from one account to another account. So there was no way of knowing whether all

the deposits were made. Only to the fact that the deposits that were made were traced into the regular accounts and then went out.

So in answer to your question --

THE COURT: You're talking about non-cash deposits? You can determine non-cash deposits, can't you? Checks?

THE WITNESS: How? Non-cash?

THE COURT: No. Checks that were deposited. Can't you determine whether they were deposited in the account? Doesn't the bank account show you that?

THE WITNESS: That's all it shows.

THE COURT: Yes. Well, you said you couldn't check.

THE WITNESS: What I meant --

THE COURT: You can check from the statement, can you not, as to what has been put in?

THE WITNESS: Yes. But what I meant was that you can't check anything beyond that. There is no source documents to check what the total receipts would have been.

Q Well, did anybody ask you to look at the documents, make a determination as to whether funds had been siphoned from the corporation for anybody's personal use?

Did anybody make that request?

A Not specifically. Not specifically.

Q Are you familiar with what a fictitious payee is? Are you familiar with that accounting principle?

A Yes.

Q What is a fictitious payee?

A A fictitious payee is where checks are made out to somebody who is a fictitious person and deposited in their accounts.

Q I see. Did you conduct an examination of the Foto Factory --

THE COURT: Well, no.

Q (Continuing) -- Foto Factory checks to determine --

THE COURT: Now, wait a minute. Is there going to be some subsequent evidence?

MR. FRIEDMAN: I am asking him, your Honor, what steps he took in connection with this audit. I would just like the jury to find out what he did do and what he didn't do.

THE COURT: Well, I thinkyou know what I mean. I don't want to leave any inference here unless actually you have some evidence to support it.

MR. FRIEDMAN: I am asking this witness that

question for the limited purpose of his testifying as to what steps he took and what steps he didn't take. It goes to the competency of his audit and nothing else.

MR. PINCUS: I object, your Honor, because there are innuendos --

THE COURT: No. I took care of that. I am going to permit him to ask the question. This is the nature of his audit, whether he actually made the examination to determine whether there has been any flow of the corporate assets to illegitimate sources.

Do you know whether you made such an examinatio

THE WITNESS: No, nothing like that, your Honor

THE COURT: I should say at this time, Mr. Friedman, that I think when an $1,800 payroll check that you asked about -- there was some evidence that there was a payroll check.

MR. FRIEDMAN: Your Honor, I don't know if that evidence was brought out in this trial or not.

THE COURT: Anyway, if there was such testimony in all fairness I want the jury to know it.

MR. FRIEDMAN: I stand corrected. If Mrs. Nieman so testified before this Court --

THE COURT: I don't know whether she did or

not. But apparently she testified someplace to that effect.

All right, next.

Don't shake your head.

MR. RIVERS: I say --

THE COURT: No pantomime. I don't want anything here. I have taken care of the situation. Now, let it be. Let it rest in peace.

Q Mr. Gallo, are you aware of any deposits being made in the National Bank of North America by Foto Factory Limited in October of 1973?

A National Bank of North America?

Q Yes.

A No.

Q Are you aware of any debit memos being put on the Foto Factory Limited account by the National Bank of North America in October of 1973?

THE COURT: You know, I just want to keep the jury straight that I thought that Mr. Kraics testified that there was a deposit made in the National Bank of North America in October. What is it, October 17 or one of those dates?

MR. FRIEDMAN: Yes. We are getting to that, your Honor, if I mayask --

THE COURT: He says he doesn't find that.

THE WITNESS: Can I answer your question?

Q Please do.

A In the report that we had issued, we had stated that there was some bit of information that we did not have. And I see that Exhibit 3, my report, is that we had no bank statements for the month of October, National Bank of North America. And I so disclosed that.

We had no bank statements. We had no cash receipts record in the corporate books. We had no cash disbursements.

THE COURT: That's all.

THE WITNESS: So in October I have nothing really on the National Bank of North America.

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Q What Mr. Rivers asked you is if-- Didn't Mr. Rivers ask you if there were deposits in the National Bank of North America, and you answered you weren't there in October '73?

MR. RIVERS: I object to this. I did not ask that question. I asked about September. When was the first time deposits were made? Because according to the young lady who testified, no deposits were made in the North America bank until October of '73.

THE COURT: Right.

MR. FRIEDMAN: Can the witness answer?

THE COURT: All right.

THE WITNESS: I am sorry.

Q On direct examination, Mr. Gallo, did you testify that there were no deposits made in connection with the National Bank of North America in October '73?

A Yes, I did, but I see that my --

Q I see.

A I see that-- No. Now, reading the report that I have, there were no bank statements for October.

Q So the information that you were giving then was incomplete with respect to the National Bank of North America in October?

A Yes.

Q Will you please look at Government's Exhibit 72 marked for identification?

A Yes, sir.

Q Are you familiar with bank statements generally?

A Yes.

Q What does that appear to be?

A Deposits. This appears to be a bank statement.

THE COURT: What Exhibit is it?

Q What bank?

A National Bank of North America.

Q And the company?

A Foto Factory, Ltd.

THE COURT: What is the number of the exhibit?

THE CLERK: 72, your Honor.

THE COURT: 72.

Q Does that have-- Does that contain deposits on it?

A Yes.

Q For October of 1973?

A Yes, sir.

Q In fact, October 18, 1973, there are circled

$95.22 deposits?

A Yes.

Q How many are there, sir?

A Seven.

Q Now, are there also debit memos in October of 1973?

A Yes, sir.

Q Now, what information-- What source of documents did you not receive from Mr. Seminara with respect to the First National City Bank account for the relevant period of time, September 15th to October 31st?

A First National City Bank, the bank statement, we had October -- we had September. We did not have October.

Q You didn't have the October bank statement for the First National City Bank?

A Yes.

Q October of 1973?

A That's right.

Q What else didn't you have?

A We had the cash receipts for September, but we did not-- The cash receipts that were recorded in the corporate books, we had for September. We did not have for October.

Q With respect to -- I'm sorry. Were you going

to say something else?

A I was going to go to disbursements recorded in the corporate books. They were recorded both in September and October. And the check stubs, we did not have for September or October.

Q For the First National City bank accounts?

A Right.

Q September and October '73 you didn't have the check stubs?

A That's right.

Q I would like to direct your attention to Chase Manhattan Bank document. Could you tell us what you didn't have in the relevant period of time with respect to the Chase Manhattan Bank documents in September 15th to October 31st?

A Chase Manhattan Bank, we had the bank statement from September and October. We had the receipts recorded in the corporate books for September, but not in October.

We had the cash disbursements recorded in the corporate books for September and October, and we had the check book stubs for September and October.

Q Now, did you conduct any investigation in order to determine if the invoices that you examined were bona fide invoices? That is, they were legitimate invoices?

A Which invoices were you referring to?

Q Any of the invoices that you looked at.

A No. They were simply on the company that--would appear to be the company invoices.

Q So you took the invoice at face value, that they were legitimate; is that correct?

A Yes, sir.

Q Now, Mr. Gallo, you testified about several debits on the--

THE COURT: When you talk about invoices at face value, are they the invoices representing the purchases?

THE WITNESS: Supplies.

THE COURT: Of film and paper, etc.?

THE WITNESS: Yes, sir.

THE COURT: Well, you also have checks for payments out?

THE WITNESS: Yes. But in answer to his question, I have checks.

THE COURT: You have checks and invoices?

THE WITNESS: I had checks and I had some invoices, and I did not have other invoices.

In other words, what I am saying, I didn't have an invoice for every single check that was

issued.

Q Now, Mr. Gallo, you testified, I believe, that there were a series of debits for one of the bank accounts. I believe Mr. Rivers asked you about debits.

Now, what I would like to ask you is to explain, if you are aware, the various types of debits that a bank would give a company like Foto Factory, Ltd. in connection with its checking account.

In other words, what are some of the --

A Well, debit memos?

Q Yes. Debits in general. What are some of the debits that a bank could give to a company that had a credit card account, a merchant account, with that bank.

A Well, if they had credited the account and that the particular credit had not been good, had bounced--checks bounced or whatever--they would debit the account.

Q So if Foto Factory wrote out a check and it was returned, that would be a debit?

A Yes.

Q By the way, what does "R" stand for on a bank statement next to a number? What does it usually stand for?

A "Returned."

Q Returned. I see. So the debits that you were talking about, they could have been for returned checks?

They could have been for charge-backs? They could have been for-- What else, if anything?

A Well, if the deposits that they had made -- if there were any checks that had come back for whatever purpose, insufficient funds, they would have charged the account and put through a debit memo.

Q Now, do you know what the code was for a charge back with the First National City Bank?

A I don't recall offhand, sir.

Q Do you know what the code was for the Chase Manhattan Bank for a chargeback?

A No, I don't recall.

Q How about the National Bank of North America?

A I really don't recall the specific-- It could be "DM"; it could be "R."

Q Could it be "A" or any other designation?

A Generally a debit memo is -- it's on a debit memo, and they send the information along with a separate slip.

Q I see. Now, did Mr. Seminara ever tell you that between September 21st and October 17th, 1973, that he caused Foto Factory, Ltd. to deposit over $70,000 in $9.95 charges in the Chase Manhattan bank?

A No, sir, I don't recall anything like that.

Q Pardon me?

A I don't recall any statement like that.

Q Did Mr. Seminara ever tell you that he helped cause over $56,000 in $9.95 charges to be put into the First National City Bank?

A No, sir, I don't recall any statement like that.

Q And did Mr. Seminara tell you that he supervised and directed over $7,000 in $9.95 charges to be put in the National Bank of North America between September 21st and October 17th, 1973?

A No statement like that to me.

MR. FRIEDMAN: Thank you, Mr. Gallo. I have no further questions.

THE COURT: All right. Any redirect?

REDIRECT EXAMINATION

BY MR. RIVERO:

Q You say you conducted an audit; is that right?

A Yes, sir.

Q And Mr. Seminara asked you to conduct an audit; is that correct?

A Yes.

Q And an audit means to compare the amount of money that comes into the company and the amount of money

that goes out, and make a determination of what was used?

A No.

Q What does it mean?

A Depends on what type of audit you're talking about. If you're talking about a certified audit, that has specific connotations with independent verification and confirmation from outside sources.

If you're talking about an audit for a specific purpose for a specific period, then there are certain limitations that you have, and the limitations that you have have to be spelled out in your report, which is what we did.

What I am saying is that on audits of this type was a limited audit in which we were tracing, searching certain types of deposits from one account to another account. It was not a certified audit.

THE COURT: It is not a certified audit?

THE WITNESS: No, sir, it is not a certified audit.

Q Now, let me ask you this: You say in the First National City account you didn't have the checking account for the month of-- you didn't have the statement, the bank statement for the month of September?

A That's right. Wait a minute. Let me check again.

First National City. First National City, we have the statement for September, but not October.

Q But your audit was for the month of -- was September 15, 1973, until October 31st of 1973; is that right?

A That's right.

Q So that the bank statement that you received for October, you received in November, the 1st of November?

A No, we didn't have that.

Q But I said you would receive it in the ordinary course of banking in the next month?

A You normally would.

MR. FRIEDMAN: I object. I believe he testified they prepared the audit in '74.

THE COURT: Yes.

MR. RIVERS: I understand. That is not my point. That is certainly not my point. I understand the testimony clearly.

THE COURT: Well, let's not take too much time unless the point is a valuable one or it is relevant.

Now, there's been a great deal of time that has been taken already on this audit. I wish you would limit yourself to what is relevant.

MR. RIVERS: I am trying to do that.

(Continued on the next page.)

-B/LH
5pm/3

Q Now, did you have the checkbook for that?

A First National City?

Q Yes.

THE COURT: I think his testimony -- he testified to a lot of that.

Didn't you say you had the check stub book?

THE WITNESS: Not that baNk.

THE COURT: First --

THE WITNESS: First National City.

Q Was there a checkbook for the First National City?

A Checkbook, you say?

Q Yes. In other words, is the --

A There had to be a checkbook that had -- if there were checks issued.

Q Yes. But there -- was there a working account at the Franklin National Bank?

A A working account?

Q Yes. Regular account at the Franklin National?

A Sure.

Q Is that the account you made the audit on to determine the income of the company?

A That was not our purpose in making the audit to determine the income of the company.

Q Let's get to the number issue. We talked about siphoned monies. Is there any indication in the statement at all that this company had siphoned money?

A No sir, I didn't see anything.

Q Were the individual siphon money?

A No.

Q Can you say -- can you give us an opinion with a fair degree of accounting certainty as to whether or not the principals of this company siphoned money?

MR. FRIEDMAN: Objection, your Honor. He's already testified that he didn't --

THE COURT: Sustained.

MR. FRIEDMAN: -- take any steps to make that determination.

MR. RIVERS: I am asking if you can give an opinion?

THE COURT: No, he cannot. Objection sustained Proceed. We are not --

MR. RIVERS: As to whether or not he can give an opinion.

THE COURT: All right.

MR. RIVERS: I have no further questions. If I can't ask him --

THE COURT: Don't get --

MR. RIVERS: If I cannot ask him whether he can give an opinion, and that's objectionable, then I have no further questions.

THE COURT: I don't care whether you have or not.

Didn't you already testify that you never made an audit for that purpose to determine --

THE WITNESS: Not a Certified Audit. It was not a Certified Audit.

THE COURT: For the purpose of whether the officers siphoned any funds out of the company.

THE WITNESS: No. We just traced the receipts.

THE COURT: You said you never made an audit for that purpose, right?

THE WITNESS: Right.

THE COURT: All right.

MR. RIVERS: I am precluded from asking whether he can give an opinion?

THE COURT: You are precluded. You've got a ruling. That is final.

MR. RIVERS: Now, I --

THE COURT: Don't argue, you have an exception. Please sit down.

MR. PINCUS: One question.

REDIRECT EXAMINATION

BY MR. PINCUS:

Q Mr. Gallo, you were asked by Mr. Friedman about something regarding the $70,000 worth of deposits that were made into the bank; isn't that so? Just a few moments ago?

THE COURT: Which bank? I think you -- I think he did testify -- I think he talked about -- wasn't it the First National?

No. It must have been the Chase Manhattan.

MR. PINCUS: Yes. I believe he asked if $70,000 was deposited. Yes.

Q Now, with respect to those deposits, was there anything in your audit to indicate what those deposits were made up of?

A Which bank accounts?

THE COURT: Chase Manhattan.

Q Chase Manhattan Bank.

A Chase Manhattan Bank. My understanding of the Chase Manhattan was that those were from credit cards. I have no --

Q My question --

A The composition of it?

Q Right.

A No sir.

Q Did they say specifically for what offer was it? The general credit card business that this company did that went into that deposit or those deposits?

A In the Chase it was the credit card business as far as I —

Q All the credit cards?

A Yes.

MR. PINCUS: Thank you. No further questions.

MR. FRIEDMAN: No questions, your Honor.

MR. RIVERS: May I ask one further question?

REDIRECT EXAMINATION

BY MR. RIVERS:

Q Did you find in the National City Bank other checks other than checks payable to the First National City Bank?

A First National City?

Q Yes.

A All the checks were issued from the First National City went to the Franklin or the National Bank of North America.

Q Payable to the bank itself?

A Yes.

Q Now, in regard to Chase —

A Franklin National. National Bank of North America. Bank of Delaware. That's all, sir.

Q First National City, all the checks were issued to the Bank of North America?

A Yes sir.

Q And to the --

A The Bank of Delaware, Bank of Delaware.

Q Bank of Delaware?

A National Bank of North America.

Q So all of these two banks were used? The checking account was used to deposit in a working account other than the Bank of Delaware?

A Yes.

Q And the working account was --

A Franklin.

Q Franklin National?

A Yes.

Q You had all the check stubs for the Franklin National?

A Yes.

Q And you compared all the checks to the check stubs for the Franklin National?

THE COURT: We went over that.

THE WITNESS: Yes sir.

MR. RIVERS: Your Honor, I didn't want to leave the jury with the impression --

THE COURT: I want to get this case done with. I have to -- as the presiding Judge here, I have to say there must not be constant repetition and accumulation.

MR. RIVERS: I am not talking about constant repetition.

THE COURT: All right.

MR. RIVERS: May I see the JUdge after the jury leaves?

THE COURT: You certainly will.

All right, we will start promptly at 9:30.

(Whereupon, the jury retired from the courtroom.)

THE COURT: All right.

MR. RIVERS: At this time I move for a mistrial based upon the fact that I have been precluded during the entire day --

THE COURT: No.

MR. RIVERS: -- especially --

THE COURT: You have not been precluded for the entire day.

MR. RIVERS: Let me finish.

THE COURT: We are going to have the facts and

8 we are going to be factual and not repetitious.

MR. RIVERS: May I finish?

THE COURT: All right.

MR. RIVERS: With regard to presenting my case, the jury is left with the impression based upon the testimony by the last witness that there was attempts or there could have been attempts to siphon off funds, when in essence the witness' testimony was every bank account, other than the Franklin National Bank, was a receiving bank.

In addition, counsel -- that is, the US Attorney leaves the jury with the implication that there was some attempts here on the part of the principals of this corporation to siphon off $1800 in cash, which $1800 was not used for payroll. Or there was -- Mr. Seminara said -- I couldn't clear that up because I couldn't ask any --

(Continued on next page)

DDS fls.

DS/LH
6pm/1

(The following continued to be heard in the absence of the jury.)

THE COURT: Well, that is just --

MR. RIVERS: At this point, your Honor, I am at a loss, with all due respect, to continue to defend this man at this point.

THE COURT: Well, let me say, Mr. Rivers, that your characterization is just inaccurate and it is unfair, and it is not in accordance with the facts.

Now what actually happened is we asked this man whether he made the determination for siphoning off and that is all. I do not think at any time it would prevent you from asking whether or not there was any indication of siphoning.

Now, in addition to that, as far as the $1800 check was concerned, although there was no evidence in here that it was for payroll, I had glanced at the Grand Jury minutes and I corrected the jury definitely that there was evidence that this $1800 was the payroll.

Now, you can't ask a man to give an opinion as to whether or not there was siphoning or not when he admits in advance that he never made an audit for that purpose.

What I am not going to let you do, Mr. Rivers, is give a wrong impression to the jury. I am not

going to let Mr. Friedman do it either.

When you get an adverse ruling, you get up and cry to the sky as though it was an erroneous ruling. And that is unfair.

MR. RIVERS: I am sorry, Judge.

THE COURT: You have got to take my ruling. And you will have your remedy in the Court of Appeals.

MR. RIVERS: That is exactly --

THE COURT: Now, that is exactly what you are asking for and I am giving it to you. And you have it But don't try to clutter up this trial with what I think is dust in the air.

Now, I have tried many cases and no one is goin to be unfair in the trial of this case. You are not. Mr. Pincus is not. And Mr. Friedman is not. That is the final statement.

MR. RIVERS: With all due respect to the Court I except to the Court's statement --

THE COURT: All right, I know all about it. This is all very dramatic. But it is not going to change my approach. I am going to call it as I see it.

I went out of my way to make it clear to the jury that the $1800 -- that there was evidence that it was a payroll.

MR. FRIEDMAN: I think you went very far out of

3 your way --

THE COURT: In addition to that.

MR. RIVERS: You would not have to --

THE COURT: Wait a minute --

MR. RIVERS: -- if he wasn't misleading the jury. He knew it was payroll.

THE COURT: Well, you don't want my opinion I am sure as to efforts to mislead the jury as to anyone here. But I will say this, that I can't let you ask a man to give an opinion when he admits he never made an audit for the purpose of ascertaining whether there is any siphoning out. Now, this was a big hullabaloo about nothing. You have your remedy.

(Thereupon at 5:05 o'clock p.m. an adjournment was taken to Tuesday, July 8, 1975 at 9:30 o'clock a.m.

******

I N D E X

Witness	Direct	Cross	Redirect	Recross
Frederick J. Kraics		1124	1185	1142-Voir Dire
Frances Nieman	1206	1260	1308	1183
David A. Krasula	1334	1336		
Francis Libasci	1315			
Cono J. Gallo	1359	1394	1419	

Exhibits		For ID	In Ev.
Government's			
69	8 Envelopes and tapes		1229
15, 17, 22, 23, 30, 32, 38, 42, 43, 44 & 46	Photostatic copies		1337
71	Letter	1311	
72	Document dated 10/31/72	1393	
Defendants'			
J	Kraics' Memorandum 11/12/73	1149	
I	Letter dated 11/9/73	1156	
K	Letter dated 11/12/73	1181	
L	Letter	1181	
N	Document dated 11/14/73	1357	

* * * *

STATE OF NEW YORK)
COUNTY OF NASSAU) SS:

BEN ATUAHENE, being duly sworn, deposes and says that deponent is over the age of 18 years, is not a party of the action and resides at Brooklyn, New York.

That on the 14th day of November, 1975, deponent served two copies of appellant's brief on appeal and one copy of appendix upon the U.S. Attorney's Office, Brooklyn, New York regarding the matter of PEOPLE v DOMINICK SEMINARA.

Sworn to before me,
this 14th day of November, 1975

Ben Atuahene
BEN ATUAHENE